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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 888 / 3

EARLE S. WELCH, APPELLANT,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED MARCH 21, 1938.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

	Original	Print
Proceedings in Supreme Court of Wisconsin	1	1
Caption ..... (omitted in printing)	1	1
Record from Circuit Court of Eau Claire County	2	1
Notice of appeal ..... (omitted in printing)	2	
Bond on appeal ..... (omitted in printing)	3	
Summons and return	5	1
Original complaint	7	2
Demurrer to original complaint	13	5
Opinion on demurrer, Wickham, J. (omitted in printing)	15	
Order overruling demurrer	23	5
Notice of appeal ..... (omitted in printing)	25	
Opinion, Wickham, J., Supreme Court	28	6
Judgment of Supreme Court	39	13
Acknowledgment of service of amended complaint	40	14
Amended complaint	41	14
Demurrer to amended complaint	48	18
Order sustaining demurrer ..... (omitted in printing)	50	
Judgment	52	19
Clerk's certificate ..... (omitted in printing)	54	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 30, 1938.

—5416

	Original	Print
Minute entry of submission.....(omitted in printing)..	55	
Judgment	56	20
Opinion, per curiam	58	20
Petition for appeal and assignments of error (omitted in printing)	60	
Order allowing appeal.....	63	21
Bond on appeal.....(omitted in printing)..	104	
Citation and service.....(omitted in printing)..	107	
Praecipe for transcript of record.....(omitted in printing)..	110	
Clerk's certificate .....(omitted in printing)..	135	
Statement of points to be relied upon and designation as to printing record	136	22
Counter-designation of parts of records to be printed.....	140	23

[fols. 1-5] STATE OF WISCONSIN,
County of Dane, ss:

I hereby certify that on the 23rd day of July, 1935, at the City of Madison, in said county and state of Wisconsin, I served the within Summons and Complaint on the within named defendant Robert K. Henry, State Treasurer of the State of Wisconsin by then and there delivering to and leaving with him personally a true copy thereof, and I also certify that at the time of said service I endorsed upon the copy so served, the date upon which the same was served and signed my name thereto, and added thereto my official title.

Lawrence O. Larson, Sheriff, by A. N. Dohle, Deputy Sheriff.

[fol. 6] [File endorsements omitted]

IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Defendant

SUMMONS—Filed July 30, 1935.

The State of Wisconsin to Said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demands of the complaint, of which a copy is herewith served upon you.

Bundy Beach & Holland, Attorneys for Plaintiff.
P. O. Address: 401-408 S. A. F. Bldg., Eau Claire, Eau Claire County, Wisconsin.

[fol. 7] [File endorsements omitted]

IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Defendant

COMPLAINT—Filed July 30, 1935

The above named plaintiff, by Bundy, Beach & Holland, his attorneys, complains of the above named defendant and for a cause of action alleges and states:

That the defendant is a resident of the City of Madison, Wisconsin, and is the duly qualified and acting State Treasurer of the State of Wisconsin; that suit against him as such public official on account of the matters and things hereinafter set forth is specifically authorized by Section 6 (3) (c) (5) of Chapter 15 of the Laws of 1935.

That plaintiff is a resident of the State of Wisconsin engaged in the insurance business and was such resident during the year 1933; that during said year the plaintiff received gross income totalling $13,383.26 from all sources as follows:

Commissions	$608.74
Interest	558.42
Rent	60.00
Dividends	12,156.10;

that during said year plaintiff paid in taxes that he was entitled to deduct for income tax purposes the sum of $72.68; that during said year the plaintiff paid interest in the sum of $1,420.25; that during said year the plaintiff sustained a net loss from the sale of securities in the sum of $8,518.84; that during said year the plaintiff expended the sum of $1,050.20 in ordinary and necessary business expenses; that the total of such payments and *and* losses was $11,
[fol. 8] 061.97, leaving the plaintiff with an actual income during said year of $2,321.29; that during said year the plaintiff made donations properly deductible for income tax purposes in the sum of $100.00;

That of the dividends above mentioned received by the plaintiff in the year 1933, $4,153.60 thereof were received

from the Eau Claire Press Company, a Wisconsin corporation doing business in the city of Eau Claire, Wisconsin, and $7,980.00 thereof were received from the National Pressure Cooker Company, a Wisconsin corporation doing business in Eau Claire, Wisconsin, making a total of $12,133.60 of such dividends which the plaintiff was entitled to deduct for purposes of determining his 1933 income subject to normal income tax in said year. The plaintiff during the year 1933 was not employed by or active in the business of either said Eau Claire Press Company or said National Pressure Cooker Company. He was not an officer or director of either of said companies but held the stock thereof as an investment for the purpose of receiving the dividends therefrom.

That on or about the 15th day of March, 1934, the plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above set forth; that by said return it appeared that the plaintiff had a total income during the year 1933 of $13,383.26; that plaintiff was entitled to deduct from said sum for normal income tax purposes the sum of $23,195.57, and that included in said deductions were the above mentioned dividends from Wisconsin corporations in the total amount of $12,133.60; that as a result thereof the plaintiff had no net income for the year 1933 subject to normal tax.

That shortly prior to the 15th day of May, 1935, defendant received from the Wisconsin Tax Commission a bill for Emergency Relief taxes purported to be assessed under the provisions of Section 6 of said Chapter 15 of the laws of 1935 in the sum of $556.84; that by said bill for taxes and by [fol. 9] the provisions of said Chapter 15 of the Laws of 1935, plaintiff was threatened with the imposition of penalties and forfeitures and with the forcible collection thereof and of said tax if the same was not paid, and that solely to avoid the imposition of such penalties and to prevent the forcible collection of said purported tax as so threatened plaintiff paid to the Wisconsin Tax Commission the sum of $545.71, being the amount of the tax so assessed, less a discount of 2% thereof, on the 15th day of May, 1935; that said payment was made under protest and accompanied by a written statement of the plaintiff protesting the imposition and collection of said purported tax; that this suit is brought for the recovery of the amount so paid as provided in Section 6 of said Chapter 15 of the Laws of 1935.

That said Section 6 of Chapter 15 of the Laws of 1935 is illegal, unconstitutional, and invalid as applied to this plaintiff for the following reasons:

1. The said Act purports to tax income received by the petitioner from dividends during the year 1933. Normal income tax upon income for that period is levied under the provisions of Chapter 72 of the Wisconsin Statutes, and it is beyond the power of the Legislature to now retroactively assess tax on the income of that year, said income having already been taxed and become a part of the plaintiff's capital. The purported tax thereon at this time is equivalent to a property tax not levied equally upon all property owners and not based upon any reasonable classification of property or tax payers and therefore contrary to the provisions of Article VIII, Section 1 of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws.

2. Plaintiff's entire income for the year 1933 amounted to the sum of $13,383.26. His deductions other than dividends from Wisconsin corporations for said period amounted to $11,061.97 plus donations of $100.00, making a [fol. 10] total of $11,161.97, so that even including the dividends received by him from Wisconsin corporations the taxpayer's total net income for said year was $2,221.39, yet by the provisions of said Section 6 of Chapter 15 of the laws of 1935 the taxpayer has been assessed upon the sum of $12,133.60. Said tax is not authorized as an income tax under Section 1 of Article VIII of the Wisconsin Constitution since it is imposed by a sum greatly in excess of the taxpayer's actual net income for said year. Said tax is not authorized as a tax on occupations under said section since it is not imposed with relation to any occupation or business of the plaintiff. Said tax is not authorized as a privilege tax under said section because no privilege is granted the plaintiff in connection therewith not an indispensible part of the ownership of said stock. The period during which said dividends were received has already passed.

The true nature of said tax is a tax on plaintiff's stock as property and upon the dividends received. As such the tax is not levied upon any uniform rule as required by Article VIII Section 1 of the Wisconsin Constitution but is discriminatory, arbitrary and in violation of said section

and of Section 13, Article I of said constitution and of the XIVth amendment to the Constitution of the United States.

Wherefore, the plaintiff demands judgment against the defendant as State Treasurer of the State of Wisconsin in the sum of $545.71, together with interest at the rate of 6% from the 15th day of May, 1935.

Bundy, Beach & Holland, Attorneys for Plaintiff.

[fols. 11-12] *Duly sworn to by Earle S. Welch. Jurat omitted in printing.*

[fol. 13] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

[Title omitted]

DEMURRER TO COMPLAINT—Filed October 22, 1935

Now comes the above named defendant, Robert K. Henry, State Treasurer of the State of Wisconsin, by James E. Finnegan, Attorney General, and Herbert H. Naujoks, Assistant Attorney General, his attorneys, and demurs to the complaint herein on the ground that it appears on the face of the said complaint that the same does not state facts sufficient to constitute a cause of action against him.

James E. Finnegan, Attorney General; Herbert H. Naujoks, Assistant Attorney General, Attorneys for Defendant.

[fols. 14-22] Due and person service of the within Demurrer admitted this 22nd day of October 1935.

Bundy, Beach & Holland, Attorney for Plaintiff.

[File endorsements omitted.]

[fol. 23] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—Filed February 7, 1936

The defendant having demurred to the plaintiff's complaint on the ground that it appears on the face thereof that it does not state facts sufficient to constitute a cause

of action, and the court having considered the arguments and briefs of counsel on said demurrer,

It is Ordered, That said demurrer be and it is hereby overruled with permission on the part of the defendant to answer said complaint within twenty days from the date of this order on payment of ten dollars costs.

Dated, February 7, 1936.

By the Court.

James Wickham, Judge.

[fols. 24-27] [File endorsements omitted.]

[fol. 28] [File endorsement omitted.]

IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Respondent,

vs.

ROBERT K. HENRY, State Treasurer, Appellant

Appeal from an order of the Circuit Court for Eau Claire County. James Wickham, Circuit Judge. Reversed.

OPINION—Filed January 12, 1937

This was an action commenced on July 23, 1935, by Earle Welch, as plaintiff, against Robert K. Henry, State Treasurer of the state of Wisconsin, defendant, to recover the sum of $45.71 paid by plaintiff under protest as an income tax pursuant to sec. 6, Ch. 15, Laws of 1935. The complaint alleged that during the year 1933, plaintiff received a total income of $13,383.26, of which $12,133.60 was in the form of dividends from Wisconsin corporations; that under the income tax laws then in effect, Ch. 71, Stats. 1933, plaintiff was entitled to deduct from his gross income the full amount of such dividends; that in addition plaintiff was entitled to deductions from his gross income for 1933 amounting to $11,161.97, plus donations of $100, making a total of $11,161.97; that as a result thereof the plaintiff had no net income for the year 1933 subject to tax; that shortly prior to the 15th day of May, 1935, defendant received from the Wisconsin tax Commission a bill for emergency relief tax assessed under the provisions of sec. 6, Ch. 15, Laws of

1935, in the sum of $556.84, which amount less a 2% discount plaintiff paid under protest; that sec. 6, Ch. 15, Laws of 1935, is unconstitutional and invalid. Judgment is de-
[fol. 29] manded against the defendant as State Treasurer of the state of Wisconsin in the sum of $545.71, together with interest. Defendant demurred to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action against him. On February 7, 1936, the lower court entered an order overruling defendant's demurrer. Defendant appeals.

[fol. 30] WICKHAM, J.:

The sole question upon this appeal is the constitutionality of sec. 6, Ch. 15, Laws of 1935, which is entitled, "Emergency Relief Tax on Certain 1933 Dividends."

The material portions of the statute here in question are as follows:

"(1) For the purpose of this section

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one percent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three percent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven percent."

Plaintiff's first contention is that the act is discriminatory and obnoxious to the provisions of the 14th amend-

ment to the United States Constitution as well as to secs. (1) and (22) of Art. 1, Wisconsin constitution. These sections read as follows:

"Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

"Section 22. The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Both plaintiff and defendant concede that while the legislature may classify persons for purposes of taxation, the classification must be based on reasonable differences or [fol. 31] distinctions which distinguish the members of a class from those of another in respects germane to some general and public purpose or object of the particular legislation. Lonisville Gas & Electric Co. v. Coleman, 277 U. S. 32. This rule is well settled and calls for no further exposition here. Plaintiff's claim is based upon the fact that under the law as it existed in 1933, and upon which plaintiff reported and paid his income taxes for that year, there was allowed to him as a deduction dividends received from Wisconsin corporations. The emergency relief tax enacted in 1935 levied a graduated tax upon dividends from Wisconsin corporations received in 1933 and at that time deductible from plaintiff's gross income. It is contended that there is no difference between plaintiff and persons receiving no income from dividends paid by Wisconsin corporations that reasonably warrants such classification. It is not contended that the legislature in 1933 could not have abolished the exemption of this dividend income if the net result had merely been to throw into the total of assessable income for the year 1933, the Wisconsin dividend of a particular taxpayer and subject it to the normal taxes for that year. However, had the legislature done this, the result would have been a general income tax, and the dividend income would have been treated on a parity with all of the taxpayer's other income. It would have been subject to the same deductions, and he could have subtracted from it the same losses that he could as against any other sort of income and it would have been taxed on an absolute parity

with such other income. It is obvious that the question here is quite different. The question is whether the legislature having theretofore exempted dividends received from Wisconsin corporations from a normal tax may by [fol. 32] separate act subject them to a special tax for emergency relief purposes. It is clear to us that there is but a single ground of differentiation, and that the classification must stand or fall upon this ground. Does the fact that the taxpayers who received dividends of Wisconsin corporations were exempt from a normal tax in 1933 so differentiate them from other persons receiving dividends during this year as to justify the subsequent levy upon them of a special income tax to meet a particular public emergency? As thus stated, two questions are involved: (1) Is the classification a valid one, and (2) whatever the answer to this may be, is there in fact any discrimination against a person receiving income from Wisconsin dividends. If the first question receives an affirmative answer, the law is valid so far as its alleged discriminatory features are concerned. If the second question receives a negative answer, plaintiff has no standing to attack it since his rights are not adversely affected. It is our conclusion that the fact that the income had previously been exempt from a normal tax is a sufficient reason for giving it different treatment upon the emergency tax. It does not impress us as material upon the issue of discrimination whether the previous exemption was accomplished by taxing all income except that derived from dividends of Wisconsin corporations or by taxing all income and allowing the deduction of income from this source. These are mere matters of form. The net result was that this income had not been subjected to a normal tax. In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income. The reason [fol. 33] for imposing a special burden is as valid as that for exempting it from the normal burden. See, State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589; C. & N. W. R. Co. vs. State, 128 Wis. 553, 108 N. W. 537. Some point is made of the fact that the emergency tax upon this particular type of income is at a rate higher than the normal tax. We are not satisfied that such is the case. While the rates are nominally higher, it may well have been considered that this income, if added to the balance of the

taxpayer's income, would normally be taxed in the higher rather than the low brackets of the normal tax, and this factor could be taken account of in establishing rates for the special tax. Recognition of this principle appears to have been given in the case of Colgate v. Harvey, 296 U. S. 404. Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against, when the whole pattern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted.

It is also contended that there is discrimination as between members of the same class for the reason that only a fixed sum is deductible from the net income which does not vary in accordance with the circumstances or amount of the net income of a stockholder receiving dividend income from Wisconsin corporations. We do not consider this objection to be valid. Considering the class to consist [fol. 34] of all persons receiving dividends from Wisconsin corporations, all are treated alike, taxed alike, given the same deduction, and the same rate of tax. So long as this is properly treated as an income tax, the progressive character of the rates cannot be considered to be objectionable. It is our conclusion that there is no clear indication here that the purpose or effect of the act is a hostile or oppressive discrimination against particular persons or classes. Beers vs. Glynn, 211 U. S. 477, Citizens Telephone Co. vs. Fuller, 229 U. S. 322.

The foregoing consideration of plaintiff's claim that the act is discriminatory took no account of the retroactive features of the law under examination. It now becomes proper to consider plaintiff's objection that the law is invalid because of these features. It is plaintiff's claim that the legislature is authorized to make income tax provisions retroactive during the year of enactment and during the preceding year where the tax upon such preceding year has not been determined and paid, but that it is beyond the power of the legislature to tax dividends received in 1933

by a statute passed in 1935. We deem this objection to be unsound. It was held in Van Dyke vs. Tax Comm., 217 Wis. 528, 259 N. W. 700, that an income tax which is given retroactive effect by the legislature cannot properly be assailed on constitutional grounds if it applies to the year in which the law is enacted or if it applies to prior but recent transactions. This is also the rule as announced by the United States Supreme Court. Brushaber vs. Union Pacific R. Co., 240 U. S. 1; Lynch v. Hornby, 247 U. S. 339; Cooper vs. U. S., 280 U. S. 409. In the Cooper case it is said that,

"That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since Brushaber vs. Union Pacific R. Co., 240 U. S. 1 and Lynch vs. Hornby, 247 U. S. 339."

[fol. 35] It is our conclusion (1) that under this rule the legislature may measure an income tax by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax, and (2) that the legislature, subject to this limitation, may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total return of the tax to the state. While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it.

The next two contentions of plaintiff may properly be considered together. They are that the tax is not authorized by the authority contained in section 1, Art. VIII, Wisconsin constitution for the imposition of taxes on income because while it purports to be a tax upon income, it is either (a) a graduated tax on gross receipts in which case it is void under the authority of Schuster v. Henry, 218 Wis. 506, 261 N. W. 20, and Stewart Dry Goods Co. vs. Lewis, 294 U. S. 550, or (b) that, being levied solely upon income from a particular kind of property, the subject of the tax is so closely bound up with the ordinary attributes of ownership that it amounts to a tax upon the property itself and as such violates the constitutional requirement of uniformity. Article VIII, section 1, provides as follows:

"the rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to

forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The general principle underlying these contentions is that a tax measured in terms of income from a business, [fol. 36] occupation or a particular kind of property is not an income tax within the meaning of that term as used in the constitution, but that it constitutes either an occupation or privilege tax in which case it must not be levied retrospectively, or a property tax, in which case it must satisfy the constitutional requirements of uniformity. The contention proves too much. If there is any validity to the contention, then a tax may only be considered an income tax if levied upon all the actual net income of a taxpayer. The exclusion from the operation of a taxing statute of the income from any particular source would destroy the income character of the tax. This would follow whether the statute expressly subjected all income to its operation, and then allowed as a deduction income from particular kinds of property, or was made applicable to less than all of the taxpayer's income. As stated before, these are mere matters of form. Hence, if plaintiff's contention be true, the income tax law of 1933 was no more an income tax than is the special act under examination here. It is our conclusion that a tax upon the net income from a particular kind of property is within the constitutional description of income taxes and is not a privilege tax or one upon the property from which the income is derived. This is, of course, true only if the tax be upon the net income. A tax upon the gross income of particular kinds of property or particular taxpayers or a particular business is doubtless within the condemnation of the Stewart and the Schuster cases, supra, and constitutes in effect a tax upon the property itself. However, taxation upon income from dividends falls in a different class. In cases to which this tax is applicable, the income is in a real sense net income to the taxpayer. The expenses of producing the income have been allowed to the corporation prior to its distribution as a [fol. 37] dividend. There are no losses or expenses to be deducted so far as this income is concerned, and if there were, the gross deduction of $750 may well be supposed suf-

ficiently to meet any minor expenses that may conceivably be imagined in connection with the production of the income. Thus, the tax is not upon gross receipts, or at least the gross receipts are not receipts so far as the particular items of income is concerned. It is our conclusion, therefore, that the tax in question constitutes an income tax; that a reasonable deduction is allowed to the taxpayer; and that being an income tax, there is no constitutional objection to the imposition of a graduated or progressive rate of tax upon such income. These conclusions sufficiently deal with the contention that the tax is a privilege tax and that it cannot be retroactively applied. It follows that the order must be reversed.

By the court: Order reversed, and cause remanded with directions to sustain the demurrer.

[fol. 38] Clerk's certificate to foregoing paper omitted in printing.

[fol. 39] IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Respondent,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Appellant

Appeal from Circuit Court Eau Claire County, State of Wisconsin

JUDGMENT—January 12, 1937

This cause came on to be heard on appeal from the order of the Circuit Court of Eau Claire County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Eau Claire County, appealed from in this cause, be, and the same is hereby, reversed,

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to sustain the demurrer.

Justices Fowler, Fairchild and Nelson dissent.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 40] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

ACKNOWLEDGMENT OF SERVICE—Filed July 31, 1937

The undersigned, Attorney General of the State of Wisconsin, attorney for the within named defendants, hereby acknowledges service of the copy of the within Complaint this 23rd day of July, 1937, together with the sum of Ten Dollars ($10.00) costs upon the service of said Complaint as set out in the order of the Circuit Court for Eau Claire County dated July 22, 1937.

Orland S. Loomis, Attorney General, by A. G. Hawley, Assistant Attorney General, Attorney for the Within Named Defendants, Robert K. Henry and Solomon Levitan as State Treasurer.

[File endorsement omitted.]

[fol. 41] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, Defendants

AMENDED COMPLAINT—Filed July 21, 1937

The above named plaintiff, by Bundy, Beach & Holland, his attorneys, complains of the above named defendants and for a cause of action alleges and states:

That the defendants are residents of the City of Madison, Wisconsin; that the defendant Robert K. Henry was the duly qualified and acting State Treasurer of the State of Wisconsin at the time of the service of the original complaint herein; that the defendant, Solomon Levitan, is the successor to said Robert K. Henry in such office and is the present duly qualified and acting State Treasurer of the State of Wisconsin; that suit against said defendants as such public officials on account of the matters and things hereinafter set forth is specifically authorized by Section 6 (3) (c) (5) of Chapter 15 of the Laws of 1935, and the inclusion of Solomon Levitan as a defendant in this amended complaint was specifically authorized by order of the court of July 22, 1937.

That plaintiff is a resident of the State of Wisconsin engaged in the insurance business and was such resident during the year 1933; that during said year the plaintiff received gross income totaling $13,383.26 from all sources as follows:

Commissions	$608.74
Interest	558.42
Rent	60.00
Dividends	12,156.10

that during said year plaintiff paid in taxes that he was entitled to deduct for income tax purposes the sum of $72.68; that during said year the plaintiff paid interest in the sum of $1,420.25; that during said year the plaintiff sustained a net loss from the sale of securities in the sum of $8,518.84; that during said year the plaintiff expended [fol. 42] the sum of $1,050.20 in ordinary and necessary business expenses; that the total of such payments and losses was $11,061.97, leaving the plaintiff with an actual income during said year of $2,321.29; that during said year the plaintiff made donations properly deductible for income tax purposes in the sum of $100.00.

That of the dividends above mentioned received by the plaintiff in the year 1933, $4,153.60 thereof were received from the Eau Claire Press Company, a Wisconsin corporation doing business in the city of Eau Claire, Wisconsin, and $7,980.00 thereof were received from the National Pressure Cooker Company, a Wisconsin corporation doing business in Eau Claire, Wisconsin, making a total of $12,133.60 of such dividends which the plaintiff was entitled to deduct for purposes of determining his 1933 income subject to normal income tax in said year under the provisions of Subsection 4 of Section 71.04 of the Wisconsin Statutes. The plaintiff during the year 1933 was not employed by or active in the business of either said Eau Claire Press Company or said National Pressure Cooker Company. He was not an officer or director of either of said companies but held the stock thereof as an investment for the purpose of receiving the dividends therefrom.

That on or about the 15th day of March, 1934, the plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above set forth; that by said return it appeared that the plaintiff

had a total income during the year 1933 of $13,383.38; that plaintiff was entitled to deduct from said sum for normal income tax purposes the sum of $23,195.57, and that included in said deductions were the above mentioned dividends from Wisconsin corporations in the total amount of [fol. 43] $12,133.60; that as a result thereof the plaintiff had no net income for the year 1933 subject to normal tax.

That by a certain Act of the Wisconsin Legislature entitled "An Act to Raise Revenues for Emergency Relief Purposes, and Making Appropriations", which said Act was published on the 27th day of March, 1935, it was provided that certain taxes should be levied upon and assessed against the taxpayers therein mentioned for the purposes therein set forth and in particular by Section 6 of said Act it was provided that a tax should be levied and assessed upon "net dividend income" as therein defined received by persons subject thereto in the calendar year 1933 at the graduated and progressive rates therein set forth.

That shortly prior to the 15th day of May, 1935, plaintiff received from the Wisconsin Tax Commission a bill for Emergency Relief taxes purported to be assessed [illegible] provisions of Section 6 of said Chapter 15 of the [illegible] 1935 in the sum of $556.84; that by said bill for tax [illegible] by the provisions of said Chapter 15 of the Laws of 1935, plaintiff was threatened with the imposition of penalties and forfeitures and with the forcible collection thereof and of said tax if the same was not paid, and that solely to avoid the imposition of such penalties and to prevent the forcible collection of said purported tax as to threatened plaintiff paid to the Wisconsin Tax Commission the sum of $545.71, being the amount of the tax so assessed, less a discount of 2% thereof, on the 15th day of May, 1935; that said payment was made under protest and accompanied by a written statement of the plaintiff protesting the imposition and collection of said purported tax; that this suit is brought for the recovery of the amount so paid as provided in Section 6 of said Chapter 15 of the Laws of 1935.

[fol. 44] That said Section 6 of Chapter 15 of the Laws of 1935 is illegal, unconstitutional, and invalid as applied to this plaintiff for the following reasons:

1. The said Act passed in 1935 purports to tax "dividend income" received by the petitioner from dividends during

the year 1933. Normal income tax upon income for that period is levied under the provisions of Chapter 72 of the Wisconsin Statutes which were in effect during the year 1933. The income and receipts of the plaintiff during the year 1933 have already been subjected to tax by the statutes as in existence during the year 1933 and have become a part of the plaintiff's capital. The purported tax upon receipts from dividends in 1933 by an Act passed in 1935 is not based upon any reasonable classification of property or taxpayers but is arbitrary and discriminatory. There is no reasonable relation between the amount of dividends received by the plaintiff during 1933 and the benefits enjoyed by him from the State of Wisconsin, or his ability to pay in 1935 and the retroactive assessment of said tax is contrary to the provisions of Section 1 of Article VIII of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws and takes the plaintiff's property without due process of law.

2. Said Section 6 of Chapter 15 of the Laws of 1935 levies a tax at a graduated and progressive rate measured only by the dividends as therein mentioned received by the taxpayer during 1933 without regard to losses or expenses which the taxpayer had during said period and without regard to the actual net income of the taxpayer from all his business activities during said year. The said tax is therefore arbitrary and discriminatory and not based upon any reasonable classification of taxpayers and is contrary [fol. 45] to the provisions of Section 1 of Article VIII of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws and takes his property without due process of law.

3. Plaintiff's entire income for the year 1933 amounted to the sum of $13,383.26. His deductions other than dividends from Wisconsin corporations for said period amounted to $11,061.97 plus donations of $100.00, making a total of $11,161.97, so that even including the dividends received by him from Wisconsin corporations the taxpayer's total net income for said year was $2,221.39, yet by the provisions of said Section 6 of Chapter 15 of the laws

of 1935 the taxpayer has been assessed upon the sum of $12,133.60. Said tax is not authorized as an income tax under Section 1 of Article VIII of the Wisconsin Constitution since it is imposed by a sum greatly in excess of the taxpayer's actual net income for said year. Said tax is not authorized as a tax on occupations under said section since it is not imposed with relation to any occupation or business of the plaintiff. Said tax is not authorized as a privilege tax under said section because no privilege is granted the plaintiff in connection therewith not an indispensible part of the ownership of said stock. The period during which said dividends were received has already passed.

The true nature of said tax is a tax on plaintiff's stock as property and upon the dividends received. As such the tax is not levied upon any uniform rule as required by Article VIII Section 1 of the Wisconsin Constitution but is discriminatory, arbitrary and in violation of said section and of Section 13, Article I of said Constitution and of the XIVth amendment to the Constitution of the United States.

[fol. 46] Wherefore, the plaintiff demands judgment against the defendants as State Treasurer of the State of Wisconsin in the sum of $545.71, together with interest at the rate of six per cent from the 15th day of May, 1935.

Bundy, Beach & Holland, Attorneys for Plaintiff.

Duly sworn to by Earle S. Welch. Jurat omitted in printing.

[fol. 47] [File endorsements omitted.]

[fol. 48] In Circuit Court of Eau Claire County

[Title omitted]

Demurrer to Amended Complaint—Filed July 31, 1937

Now come the above named defendants, by Orland L. Loomis, Attorney General and A. G. Hawley, Assistant Attorney General, their attorneys, and demur to the complaint herein on the grounds that it appears on the face

of said complaint that the same does not state facts sufficient to constitute a cause of action against them.

Orland S. Loomis, Attorney General; A. G. Hawley, Assistant Attorney General, Attorneys for Defendants.

[File endorsements omitted.]

[fols. 49-51] Due and personal service of the within Demurrer admitted this 21st day of July 1937.

Bundy, Beach & Holland, Attorneys for Plaintiff.

[fol. 52] In Circuit Court of Eau Claire County

Earle S. Welch, Plaintiff.

v.

Robert K. Henry and Solomon Levitan, as State Treasurer of the State of Wisconsin, Defendants

Judgment—Filed October 27, 1937

An order having been entered in this action, on the 27th day of October, 1937, sustaining the demurrer to the amended complaint herein and giving the plaintiffs leave to amend their complaint herein within twenty days after service of such order upon their attorneys, and the plaintiff's attorneys having appeared in court and waiving any and all service of such order upon them and reserving an exception to said order and electing to file no further complaint and consenting that the court shall forthwith and in an orderly manner proceed with this cause, and

On motion of Orland S. Loomis, Attorney General, and A. G. Hawley, Assistant Attorney General, attorneys for the defendants,

It is Ordered and Adjudged that the complaint herein be, and the same hereby is dismissed without costs being taxed to either party.

Dated October 27, 1937.

By the Court.

James Wickham, Circuit Judge.

[fols. 53-55] [File endorsements omitted.]

[fols. 56-57] IN SUPREME COURT OF WISCONSIN

Eau Claire Circuit Court

EARLE S. WELCH, Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, Respondents

JUDGMENT—January 14, 1938

This cause came on to be heard on appeal from the judgment of the Circuit Court of Eau Claire County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Eau Claire County, in this cause, be, and the same is hereby, affirmed.

[fol. 58] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, Respondents

Appeal from a judgment of the circuit court for Eau Claire County. James Wickham, Circuit Judge. Affirmed.

OPINION—Filed Jan. 15, 1938.

This action was begun by Earle S. Welch, Plaintiff, against Robert K. Henry and Solomon Levitan as Treasurer of the State of Wisconsin, defendants, to recover certain taxes paid by the plaintiff under protest. There was a demurrer to the complaint. The demurrer was sustained. The plaintiff did not amend and judgment was entered on October 27, 1937, dismissing the plaintiff's complaint, from which judgment the plaintiff appeals.

[fols. 59-62] PER CURIAM:

This case was before this Court and reported in Welch v. Henry (1937), 223 Wis. 319, 271 N. W. 68, to which refer-

ence is made for a statement of facts. On the former appeal and upon this appeal the plaintiff contends that the statute in question offends Sec. 1 of the fourteenth amendment to the constitution of the United States. Upon the former appeal this Court considered and rejected the plaintiff's contention that the act in question violated his rights under sec. 1 of the fourteenth amendment to the constitution of the United States. We have reconsidered plaintiff's contention and find nothing in the act violative of the plaintiff's rights under said section 1 of the fourteenth amendment. Reference is made to the opinion in that case and for the reasons there stated the judgment appealed from is affirmed.

Judgment affirmed.

[fol. 63] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 17, 1938

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Wisconsin on the 15th day of January, 1938, and from each and every part thereof, and having presented and filed a petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty days of this date.

It is Further Ordered that security for costs on appe be fixed in the sum of $500.00.

Dated: February 17, 1938.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin.

[fols. 64-135] Service of copy of within admitted this 17th day of February, A. D. 1938.

Orland S. Loomis, Attorney General of Wisconsin, by Harold H. Persons, Assistant Attorney General.

[fol. 136] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed March 24, 1938

Comes now Earle S. Welch, the appellant in the above entitled cause, and a resident of the State of Wisconsin, and states that the points upon which he intends to rely in this court in this case are as follows:

1. Section 6 of Chapter 15 of the Laws of Wisconsin of 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deny to any person within its jurisdiction the equal protection of the laws, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

2. Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

[fol. 137] Appellant further states that only the following parts of the record as filed in this court, are deemed

necessary to be printed for the consideration of the points set forth above, viz:

Title of Paper	Record Page
Plaintiff's amended complaint	40–47
Defendants' demurrer to amended complaint	48–49
Judgment of circuit court of October 27, 1937 dismissing plaintiff's amended complaint	52–53
Judgment of Wisconsin Supreme Court Jan. 14, 1938 affirming judgment of circuit court	56
Opinion of Wisconsin Supreme Court Jan. 15, 1938	57–59

Dated March 21, 1938.

John M. Campbell, Attorney for Appellant.

[fol. 138] Due personal service on us of a copy of within Statement of Points to be Relied upon and designation of parts of record to be printed is hereby admitted this 21st day of March, 1938.

Orland S. Loomis, Attorney General of the State of Wisconsin. Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin.

[fol. 139] [File endorsement omitted.]

[fol. 140] In Supreme Court of the United States

Counter Designation of Parts of Record to be Printed—Filed April 9, 1938

Comes Now the Appellees in the above-entitled cause and designate that the following parts of the record, as filed in this Court, in addition to those designated by the Appellant, are deemed necessary to be printed for the consideration of the Court herein, to wit:

Title of Paper	Record Page
Plaintiff's Original Complaint	5-12
Defendants' Demurrer to Complaint	13-14
Order of Circuit Court of February 7, 1936, Overruling Demurrer to Complaint	23-24

Title of Paper Record P
Opinion of Wisconsin Supreme Court of January 12, 1937
Judgment of Wisconsin Supreme Court, January 12, 1937

Dated April 6, 1938.

Orland S. Loomis, Attorney General of the State of Wisconsin. Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin.

[fol. 141] Harold H. Persons, being first duly sworn, on oath deposes and says that he is Assistant Attorney General of the State of Wisconsin; that on the 7th day of April, A. D. 1938, he made service of the attached Counterdesignation of Parts of Record to be Printed on John M. Campbell, Attorney for the Appellant by then and there depositing a true copy thereof in a sealed envelope, addressed to said John M. Campbell, Attorney at Law, 401-408 S. A. F. Building, Eau Claire, Wisconsin, with postage duly prepaid, in the Postoffice at the City of Madison, County of Dane, State of Wisconsin.

Harold H. Persons

Subscribed and sworn to before me this 7th day of April, 1938. Warren H. Resh, Notary Public Dane County, Wisconsin. My commission expires May 12, 1940. (Seal.)

[fol. 142] [File endorsement omitted.]

Endorsed on cover: File No. 42,369. Wisconsin Supreme Court. Term No. 888. Earle S. Welch, appellant, vs. Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin. Filed March 21, 1938. Term No. 888, O. T., 1937.

FILE COPY

No. 13

Appellant,

v.

STATEMENT AS TO JURISDICTION

Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	2
Date of the judgment sought to be reviewed and date of application for appeal	3
Nature of the case and rulings below	3
Cases believed to sustain jurisdiction	5
Exhibit "A"—Decision of the Circuit Court, Eau Claire County	6
Exhibit "B"—Decision of the Supreme Court of the State of Wisconsin	11
Exhibit "C"—Dissenting opinion of Fowler, J.	19
Exhibit "D"—Dissenting opinion of Fairchild, J.	26
Exhibit "E"—Opinion of the Supreme Court of the State of Wisconsin	30

Table of Cases Cited.

Colgate v. *Harvey*, 296 U. S. 404	5
Fisher's Blend Station v. *Commission*, 297 U. S. 650	5
Louisville Gas and Electric Co. v. *Coleman*, 277 U. S. 32	5
Schlesinger v. *Wisconsin*, 270 U. S. 230	5
Senior v. *Braden*, 295 U. S. 422	5

Statutes Cited.

Constitution of the United States, 14th Amendment, Section 1	3
Judicial Code, Section 237a (28 U. S. C. 344)	1
Laws of Wisconsin for 1935, Chapter 15, Subsection 5, Para. 5	3
Laws of Wisconsin for 1935, Chapter 15, Section 6	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 888

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN,

Appellee.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF WISCONSIN IN THE ABOVE CAUSE.

This statement is presented in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States for the purpose of disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Wisconsin in the above entitled cause.

It is believed that the jurisdiction of the Supreme Court of the United States is sustained by Paragraph A of Section 237 of the Judicial Code (Section 344 of Title 28 of the United States Code) for the reason that the appeal is

sought from a judgment in the highest court of a State in which a decision could be had in a case in which there is drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

The statute of the State of Wisconsin, the validity of which is involved, is Section 6 of Chapter 15 of the Laws of Wisconsin for 1935, published March 27, 1935. That section is entitled "Emergency Relief Tax on Certain 1933 Dividends." The material portions thereof are as follows:

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent."

The judgment of the Supreme Court of the State of Wisconsin here sought to be reviewed was rendered on the 15th

day of January, 1938. The application for appeal is presented this 17th day of February, 1938.

The plaintiff and appellant was assessed a tax under the purported authority of Section 6 of Chapter 15 of the Laws of 1935 in the sum of five hundred forty-five and 71/100 dollars ($545.71) which he paid under protest. He then instituted this action in the Circuit Court for Eau Claire County for the purpose of securing the repayment of the money thus paid. In adopting this procedure he followed the remedy specifically provided by Paragraph 5 of Subsection 5 of said Statute. The complaint sought the repayment of the tax paid on the ground that Section 6 of Chapter 15 of the Laws of 1935 was in violation of the Constitution of the State of Wisconsin and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. No other grounds for the cause of action were alleged except the violation of the State and Federal Constitutions by the Act in question. It is believed, therefore, that the question of the validity of the Statute under the Constitution of the United States was raised in the first instance in the complaint and that the questions raised are substantial because of the fact that the plaintiff and appellant had been assessed a tax under the purported authority of the statute which he had paid under protest and the repayment of which was sought.

The defendant and appellee filed a demurrer to the original complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Circuit Court for Eau Claire County entered an order overruling this demurrer on the ground that the Act in question did violate Section 1 of the Fourteenth Amendment to the Constitution of the United States as appears from the decision of that court which constitutes a part of the record herein and a copy of which is hereto attached. The defendant and present appellee appealed from the order overruling the

demurrer to the Supreme Court of the State of Wisconsin which reversed the action of the Circuit Court for Eau Claire County and remanded the cause with directions to sustain the demurrer. In so doing the Supreme Court of Wisconsin recognized that the plaintiff and appellant had questioned the validity of the Statute under the Fourteenth Amendment to the Constitution of the United States and passed upon that contention adversely as indicated by the opinion filed in that appeal and by the dissenting opinion of a minority of the court, a copy of which is hereto attached. Thereafter the case was remanded to the Circuit Court for Eau Claire County which entered an order sustaining the demurrer pursuant to the mandate of the Supreme Court of the State of Wisconsin and granted the plaintiff and appellant leave to file an amended complaint. Such an amended complaint was filed in which again the invalidity of the Statute in question under the provisions of the Constitution of the United States was alleged. A demurrer was filed to the amended complaint of the plaintiff which was sustained and the defendant not choosing to plead further a judgment was entered from which an appeal was again taken to the Supreme Court of the State of Wisconsin. The judgment of that court, from which the present appeal to the Supreme Court of the United States is sought, affirmed the judgment of the Circuit Court for Eau Claire County dismissing the complaint and in the opinion filed therewith, a copy of which is hereto attached, the contentions of the plaintiff and appellant as to the invalidity of the Statute under the Federal Constitution were again recognized, considered and decided adversely to him and in favor of the validity of the Statute.

No great list of authorities seems necessary to establish the proposition that a State taxing statute must conform

to the requirements of the Fourteenth Amendment to the Federal Constitution.

Louisville Gas and Electric Co. v. *Coleman*, 277 U. S. 32.

The many cases in which appeals and writs of error have been granted to review the decisions of State courts as to the validity of taxing statutes under the Federal Constitution all support the jurisdiction in this case. These include

Schlesinger v. *Wisconsin*, 270 U. S. 230;
Colgate v. *Harvey*, 296 U. S. 404;
Senior v. *Braden*, 295 U. S. 422,
Fisher's Blend Station v. *Commission*, 297 U. S. 650;

and many others.

Respectfully submitted,

JOHN M. CAMPBELL,
Attorney for Appellant.

EXHIBIT "A".

CIRCUIT COURT, EAU CLAIRE COUNTY.

EARLE S. WELCH, *Plaintiff*,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, *Defendant*.

Decision of Court.

The plaintiff brought suit against the defendant to recover $545.71, with interest from May 15, 1935, which was paid under protest by the plaintiff to the defendant as an emergency tax levied against the plaintiff under the provisions of Section 6, of chapter 15 of the laws of 1935. The defendant demurred to the complaint on the ground that it appears on the face thereof that it does not state facts sufficient to constitute a cause of action.

By this Chapter, which was published March 27, 1935, the Legislature levied and directed to be collected five different emergency taxes:

(1) An emergency tax on individuals generally based on their net incomes of 1934;

(2) An emergency inheritance tax based on transfers thereafter made;

(3) An emergency tax on the business of telephone companies transacted during the year 1934;

(4) An emergency tax on the business of electric light and power companies transacted during the year 1934; and

(5) An emergency tax levied on persons who received dividends from corporate profits during the year 1933.

The tax in question is a tax of the fifth class. It was levied and collected pursuant to the provisions of section 6, of this chapter. The statute provides that the only remedy of a taxpayer who desires to contest the validity of the tax is to

pay the tax under protest and bring suit against the State Treasurer to recover it back.

The complaint alleges that in the year 1933, the plaintiff's total gross income was $13,383.26, of which amount $12,156.10 was money received by him as dividends from certain corporations. It alleges that his total losses and expenses for that year were $11,061.97, leaving an actual net income, including dividends, of only $2,321.29, and that under the laws of 1933, pursuant to which he made his return in 1934, his total losses and deductions, including dividends, were $23,195.57.

The plaintiff was assessed under this statute on his 1933 income for having received a gross dividend income of $12,156.10 and for having received a net dividend income of $750.00 less than the gross amount. This was in accordance with the provisions of the statute.

The sole question involved in this case is the constitutionality of section 6, of chapter 15, of the laws of 1935.

It is argued by plaintiff's counsel that the statute is unconstitutional on three grounds:

(1) That the statute is unconstitutional because the tax is not based on an income, gain or profit, but is based on one item of gross income without deducting losses or expenses of any kind and without allowing any deduction, except an arbitrary one of $750.00.

(2) That the statute is unconstitutional because it arbitrarily takes private property for public use in violation of vested rights. It is admitted that a statute may be lawfully made retroactive during the period when the annual tax is being collected and disbursed. It is admitted that a statute may also be made retroactive when necessary to collect a tax which a taxpayer legally or equitably owes, and for the purpose of supplying a remedy where existing law is inadequate to give complete relief. It is contended that when a taxpayer has fully paid his tax according to law, when no tax legal or equitable exists and when the annual period for its collection and disbursement has expired that the legislature is without power by a retroactive statute to create an obligation to pay a tax on past transactions where no obligation previously existed.

In the following cases statutes somewhat similar in nature were held to be invalid:

Forbes Pioneer Boat Line v. *Board of Commissioners*, 258 U. S. 238, 66 L. Ed. 647;

Nichols v. *Coolidge*, 247 U. S. 531, 71 L. Ed. 1184;

Norris v. *Tax Commission*, 205 Wisconsin, 626.

(3) It is claimed that the statute is unconstitutional because it denies to the plaintiff and to other persons who received dividends during the year 1933, equal protection of the laws.

It is argued by counsel for the defendant that no statute should be held to be unconstitutional if its validity can be sustained by any reasonable construction or if there is a reasonable doubt as to its validity. It is also argued that in the classification of persons and property for taxation it is proper for the Legislature to make different provisions applicable to different classes where reasonable and necessary to do so in order to provide a fair and equitable distribution of the burden of taxation and that such a classification is valid although it does not always work out equitably in the distribution of this burden to a mathematical accuracy.

There is no doubt as to the correctness of these contentions of defendant's counsel. They have been stated so often by courts, State and Federal, that they have become too familiar to require the citation of authorities for their support. It must also be remembered that none of these rules mean that the constitution, State or Federal, is no longer in force. All persons within their jurisdiction are entitled to constitutional protection. The duty to support the constitution does not end with the taking of an official oath.

I find it unnecessary to determine the two first objections raised to the validity of this statute as I am basing my decision on the ground that the statute in question denies to the plaintiff equal protection of the laws.

The emergency tax levied by section 6 discriminates against one class of taxpayers. The tax is levied on stockholders of corporations who received from corporate profits dividends in the year 1933. All other taxpayers are exempt from the tax. Under most income tax laws heretofore en-

acted where a corporation pays a tax on its profits it has been regarded as unfair to levy another tax on the same profit against the individual stockholders. In this instance, however, the order of things is reversed with a vengence and the individual stockholder is singled out as the only person against whom the tax is levied. No other emergency tax, either by section 6 or by any other section of the chapter, is levied against any person on account of the receipt by him of any other kind of income in the year 1933. No other tax is levied tending to equalize this inequality. In the emergency tax levied by section 2 of this chapter on the 1934 incomes, stockholders who have been subjected to this special dividend tax are again included and assessed like all other taxpayers and are subjected to another and additional emergency tax.

In the equitable distribution of taxation persons receiving dividends in the year 1933 should not be classified less favorably than persons receiving other kinds of income that year. For the purpose of taxation the income was not materially different than the following kinds: Salaries paid officers of private corporations; salaries paid to public officials; interest; rents; profit and income of all kinds received by individuals and corporations generally, unless some good reason appeared for some legislative exception.

The statute is also discriminatory against the class of persons receiving dividends in the year 1933 when compared with other classes of persons when such other classes are assessed at all. It discriminates in being more drastic in limiting deductions for losses, expenses and exemptions. It is more drastic in the rapid increase of the graduated rate. For some reason one class only was selected to bear the entire burden of the emergency tax in question. This class was subjected to an unusually inequitable burden.

The Legislature may lawfully exempt from taxation certain classes of property or certain classes of income or apply different rules to different classes of taxpayers where some substantial difference exists in the various classes and some reasonable ground exists justifying the classification. Such statutes have been frequently sustained. If the inequality is not substantial and only results from the application of some necessary general rule of law, the validity of the stat-

ute will be sustained. If the inequality in one respect is offset or equalized by some other provision of the statute, the validity of the statute will be sustained. The Legislature has a broad discretion on this subject in distributing the burden of taxation in a just and equitable manner so long as it does not resort to an arbitrary classification. If no real and substantial difference exists in the different classes as appears from the purpose for which the statute was enacted and if an arbitrary and inequitable distribution of the burden of taxation has been made violating plain principles of justice, then the statute should be condemned as denying to one class equal protection of the laws.

In this case the classification is purely arbitrary. It has no logical bearing on the purpose for which the statute was enacted, or on the moral duty or ability of the class discriminated against to pay the burden of taxation. A tax distributed among various classes of taxpayers but imposing 100% of the tax on one relatively small class and nothing on any of the other classes is about as arbitrary, inequitable and unjust as could well be imagined. It is useless to argue that there was an attempt in the classification to make a fair and equitable distribution of the burden of this tax when in fact no distribution of any kind among the different classes was made or attempted.

This case is not one which makes it necessary to analyze and discuss in detail the great mass of authorities which might be cited on this subject. In the following cases statutes were held to be unconstitutional which were much less objectionable than the statute involved in this case:

Travis v. *Yale & Town Mfg. Co.*, 252 U. S. 60, 64 L. Ed. 460;

F. S. Royster Guano Co. v. *Virginia*, 253 U. S. 412, 64 L. Ed. 989;

Air-Ways El. A. Co. v. *Day*, 266 U. S. 71, 69 L. Ed. 169;

Louisville Gas & El. Co. v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770;

Nat. L. Ins. Co. v. *United States*, 277 U. S. 508, 72 L. Ed. 968;

Colgate v. *Harvey* (U. S.), 80 L. Ed. 225;

Ed Schuster, Inc. v. *Henry*, 261 N. W. (Wis.) 20.

In *Colgate* v. *Harvey*, 80 L. Ed. 225, one of the latest decisions of the United States Supreme Court on this subject, it was held that a statute was invalid which levied an income tax on one class of persons for interest collected on money loaned without the state and exempted another class for interest collected on money loaned within the state. The court held that the distinction in the classification was an arbitrary one considering the purpose for which the statute was enacted and that the statute denied to one class equal protection of the laws. That decision serves to illustrate how far beyond the borderline of validity the Legislature went in enacting the statute in question. The demurrer to the complaint will be overruled.

JAMES WICKHAM,
Circuit Judge.

EXHIBIT "B".

IN SUPREME COURT, STATE OF WISCONSIN,

AUGUST CALENDAR, 1936. JANUARY TERM, 1937.

No. 23

EARLE S. WELCH, *Respondent*,

vs.

ROBERT K. HENRY, State Treasurer, *Appellant*.

Appeal from an Order of the Circuit Court for Eau Claire County. James Wickham, Circuit Judge. *Reversed*.

This was an action commenced on July 23, 1935, by Earle Welch, as plaintiff, against Robert K. Henry, State Treasurer of the state of Wisconsin, defendant, to recover the sum of $545.71 paid by plaintiff under protest as an income tax pursuant to sec. 6, Ch. 15, Laws of 1935. The complaint alleged that during the year 1933, plaintiff received a total income of $13,383.26, of which $12,133.60 was in the form of dividends from Wisconsin corporations; that under the income tax laws then in effect, Ch. 71, Stats. 1933, plaintiff was entitled to deduct from his gross income the full

amount of such dividends; that in addition plaintiff was entitled to deductions from his gross income for 1933 amounting to $11,161.97, plus donations of $100, making a total of $11,161.97; that as a result thereof the plaintiff had no net income for the year 1933 subject to tax; that shortly prior to the 15th day of May, 1935, defendant received from the Wisconsin Tax Commission a bill for emergency relief tax assessed under the provisions of sec. 6, Ch. 15, Laws of 1935, in the sum of $556.84, which amount less a 2% discount plaintiff paid under protest; that sec. 6, Ch. 15, Laws of 1935, is unconstitutional and invalid. Judgment is demanded against the defendant as State Treasurer of the state of Wisconsin in the sum of $545.71, together with interest. Defendant demurred to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action against him. On February 7, 1936, the lower court entered an order overruling defendant's demurrer. Defendant appeals.

WICKHEM, *J.*

The sole question upon this appeal is the constitutionality of sec. 6, Ch. 15, Laws of 1935, which is entitled, "Emergency Relief Tax on Certain 1933 Dividends."

The material portions of the statute here in question are as follows:

"(1) For the purpose of this section

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all

persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent."

Plaintiff's first contention is that the act is discriminatory and obnoxious to the provisions of the 14th amendment to the United States Constitution as well as to secs. (1) and (22) of Art. 1, Wisconsin constitution. These sections read as follows:

"SECTION 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

"SECTION 22. The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Both plaintiff and defendant concede that while the legislature may classify persons for purposes of taxation, the classification must be based on reasonable differences or distinctions which distinguish the members of a class from those of another in respects germane to some general and public purpose or object of the particular legislation. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32. This rule is well settled and calls for no further exposition here. Plaintiff's claim is based upon the fact that under the law as it existed in 1933, and upon which plaintiff reported and paid his income taxes for that year, there was allowed to him as a deduction dividends received from Wisconsin corpora-

tions. The emergency relief tax enacted in 1935 levied a graduated tax upon dividends from Wisconsin corporations received in 1933 and at that time deductible from plaintiff's gross income. It is contended that there is no difference between plaintiff and persons receiving no income from dividends paid by Wisconsin corporations that reasonably warrants such a classification. It is not contended that the legislature in 1933 could not have abolished the exemption of this dividend income if the net result had merely been to throw into the total of assessable income for the year 1933, the Wisconsin dividend of a particular taxpayer and subject it to the normal taxes for that year. However, had the legislature done this, the result would have been a general income tax, and the dividend income would have been treated on a parity with all of the taxpayer's other income. It would have been subject to the same deductions, and he could have subtracted from it the same losses that he could as against any other sort of income and it would have been taxed on an absolute parity with such other incomes. It is obvious that the question here is quite different. The question is whether the legislature having theretofore exempted dividends received from Wisconsin corporations from a normal tax may by separate act subject them to a special tax for emergency relief purposes. It is clear to us that there is but a single ground of differentiation, and that the classification must stand or fall upon this ground. Does the fact that the taxpayers who received dividends of Wisconsin corporations were exempt from a normal tax in 1933 so differentiate them from other persons receiving dividends during this year as to justify the subsequent levy upon them of a special income tax to meet a particular public emergency? As thus stated, two questions are involved: (1) Is the classification a valid one, and (2) whatever the answer to this may be, is there in fact any discrimination against a person receiving income from Wisconsin dividends. If the first question receives an affirmative answer, the law is valid so far as its alleged discriminatory features are concerned. If the second question receives a negative answer, plaintiff has no standing to attack it since his rights are not adversely affected. It is our conclusion that the fact

that the income had previously been exempt from a normal tax is a sufficient reason for giving it different treatment upon the emergency tax. It does not impress us as material upon the issue of discrimination whether the previous exemption was accomplished by taxing all income except that derived from dividends of Wisconsin corporations or by taxing all income and allowing the deduction of income from this source. These are mere matters of form. The net result was that this income had not been subjected to a normal tax. In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income. The reason for imposing a special burden is as valid as that for exempting it from the normal burden. See, *State ex rel. Atwood* v. *Johnson*, 170 Wis. 218, 175 N. W. 589; *C. & N. W. R. Co.* v. *State*, 128 Wis. 553, 108 N. W. 557. Some point is made of the fact that the emergency tax upon this particular type of income is at a rate higher than the normal tax. We are not satisfied that such is the case. While the rates are nominally higher, it may well have been considered that this income, if added to the balance of the taxpayer's income, would normally be taxed in the higher rather than the lower brackets of the normal tax, and this factor could be taken account of in establishing rates for the special tax. Recognition of this principle appears to have been given in the case of *Colgate* v. *Harvey*, 296 U. S. 404. Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against, when the whole pattern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted.

It is also contended that there is discrimination as between members of the same class for the reason that only

a fixed sum is deductible from the net income which does not vary in accordance with the circumstances or amount of the net income of a stockholder receiving dividend income from Wisconsin corporations. We do not consider this objection to be valid. Considering the class to consist of all persons receiving dividends from Wisconsin corporations, all are treated alike, taxed alike, given the same deduction, and the same rate of tax. So long as this is properly treated as an income tax, the progressive character of the rates cannot be considered to be objectionable. It is our conclusion that there is no clear indication here that the purpose or effect of the act is a hostile or oppressive discrimination against particular persons or classes. *Beers* v. *Glynn*, 211 U. S. 477, *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322.

The foregoing consideration of plaintiff's claim that the act is discriminatory took no account of the retroactive features of the law under examination. It now becomes proper to consider plaintiff's objection that the law is invalid because of these features. It is plaintiff's claim that the legislature is authorized to make income tax provisions retroactive during the year of enactment and during the preceding year where the tax upon such preceding year has not been determined and paid, but that it is beyond the power of the legislature to tax dividends received in 1933 by a statute passed in 1935. We deem this objection to be unsound. It was held in *Van Dyke* v. *Tax. Comm.*, 217 Wis. 528, 259 N. W. 700, that an income tax which is given retroactive effect by the legislature cannot properly be assailed on constitutional grounds if it applies to the year in which the law is enacted *or if it applies to prior but recent transactions*. This is also the rule as announced by the United States Supreme Court. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1; *Lynch* v. *Hornby*, 247 U. S. 339; *Cooper* v. *U. S.*, 280 U. S. 409. In the Cooper case it is said that,

> "That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross in-

come has not been open to serious doubt since. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 339."

It is our conclusion (1) that under this rule the legislature may measure an income tax by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax, and (2) that the legislature, subject to this limitation, may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total return of the tax to the state. While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it.

The next two contentions of plaintiff may properly be considered together. They are that the tax is not authorized by the authority contained in section 1, Art. VIII, Wisconsin constitution for the imposition of taxes on income because while it purports to be a tax upon income it is either (a) a graduated tax on gross receipts in which case it is void under the authority of *Schuster* v. *Henry*, 218 Wis. 506, 261 N. W. 20, and *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, or (b) that, being levied solely upon income from a particular kind of property, the subject of the tax is so closely bound up with the ordinary attributes of ownership that it amounts to a tax upon the property itself and as such violates the constitutional requirement of uniformity. Article VIII, section 1, provides as follows:

> "the rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The general principle underlying these contentions is that a tax measured in terms of income from a business, occupation or a particular kind of property is not an in-

come tax within the meaning of that term as used in the constitution, but that it constitutes either an occupation or privilege tax in which case it must not be levied retrospectively, or a property tax, in which case it must satisfy the constitutional requirements of uniformity. The contention proves too much. If there is any validity to the contention, then a tax may only be considered an income tax if levied upon all the actual net income of a taxpayer. The exclusion from the operation of a taxing statute of the income from any particular source would destroy the income character of the tax. This would follow whether the statute expressly subjected all income to its operation, and then allowed as a deduction income from particular kinds of property, or was made applicable to less than all of the taxpayer's income. As stated before, these are mere matters of form. Hence, if plaintiff's contention be true, the income tax law of 1933 was no more an income tax than is the special act under examination here. It is our conclusion that a tax upon the net income from a particular kind of property is within the constitutional description of income taxes and is not a privilege tax or one upon the property from which the income is derived. This is, of course, true only if the tax be upon the net income. A tax upon the gross income of particular kinds of property or particular taxpayers or a particular business is doubtless within the condemnation of the *Stewart* and the *Schuster* cases, *supra*, and constitutes in effect a tax upon the property itself. However, taxation upon income from dividends falls in a different class. In cases to which this tax is applicable, the income is in a real sense net income to the taxpayer. The expenses of producing the income have been allowed to the corporation prior to its distribution as a dividend. There are no losses or expenses to be deducted so far as this income is concerned, and if there were, the gross deduction of $750 may well be supposed sufficiently to meet any minor expenses that may conceivably be imagined in connection with the production of the income. Thus, the tax is not upon gross receipts, or at least the gross receipts are net receipts so far as the particular items of income is concerned. It is our conclusion, therefore, that the tax in ques-

tion constitutes an income tax; that a reasonable deduction is allowed to the taxpayer; and that being an income tax, there is no constitutional objection to the imposition of a graduated or progressive rate of tax upon such income. These conclusions sufficiently deal with the contention that the tax is a privilege tax and that it cannot be retroactively applied. It follows that the order must be reversed.

By the court: Order reversed, and cause remanded with directions to sustain the demurrer.

EXHIBIT "C".

IN SUPREME COURT, STATE OF WISCONSIN.

August Calendar, 1936. January Term, 1937.

No. 23.

EARLE S. WELCH, *Respondent*,

v.

ROBERT K. HENRY, State Treasurer, *Appellant*.

FOWLER, *J.* (dissenting):

This is an action to recover a tax paid under protest assessed under sec. 6, Ch. 15, Laws of 1935, enacted March 27, 1935, which by its terms imposes an emergency tax on persons who received dividends from Wisconsin corporations during the year 1933 which were then deductible from the income on which the normal income tax of the person who received them was computed.

The claimed basis for the imposition of the tax upon the species of income covered by it and not imposing it upon any other species of income during that year, is that all other species of income were included in the income on which the normal income tax was computed, and were thus taxed, while the dividends covered by the section were not included and not taxed. It is reasoned that as these

dividends might properly have been taxed during the year 1933 and were not then taxed, it is proper to tax them now, by analogy to the rule that property or income omitted from taxation during one year may be taxed in subsequent years on discovery of the omission.

That reasoning would support a tax imposed by a statute of 1935 on church property and all other property exempt from taxation by the laws as they stood in 1933. Would such a tax be legal, or would it be an illegal interference with vested property rights? This question was propounded in *First National Bank* v. *Covington*, 103 Fed. 523, 527, where it is said that the court would not say that there might not be an extreme case where retroactive taxation for a previous year upon property then not subject to taxation at all might be levied, but points out that if the power exists at all, there is no limit to its exercise, and under it property exempt by law might be taxed for so many years back that it would be wholly confiscated. The latter of course would not be permissible.

In the *Covington* case *supra*, a state statute by its terms provided that by reason of the fact that a prior statute taxing the franchises of national banks had been declared invalid by the Supreme Court of the United States, a tax was imposed on the shares of stock of such banks within the state, and by a section of the latter statute it was applied retroactively to include taxation of shares during the period between the two enactments. The retroactive section was held unconstitutional and a preliminary injunction was granted against assessing any tax under the latter statute for the period prior to its enactment. The period reached back several years, but the injunction went against taxation for the last year of the period as well as the first. It is stated in 2 Cooley on Taxation, (4th Ed.) sec. 520, upon the authority of this case, that "It would seem that a statute cannot impose retroactive taxation for previous years upon a class of property not then subject to taxation," and this statement is cited with approval in *Norris* v. *Tax Commission*, 205 Wis. 626, 628, 237 N. W. 113.

In *Weber* v. *City of Detroit*, 158 Mich. 149, 150, 122 N. W. 570, it is held that a statute imposing personal liability for special improvement assessments made prior to its enactment, where no such liability existed prior to its enactment, was void. For like reason a tax levied on property or an item of income for a period when it was exempt from taxation would be void.

The only adjudicated case bearing directly upon the precise point under discussion that I have been able to discover is the *Covington* case, *supra*. I find two other cases, however, that bear upon it indirectly and to my mind quite persuasively. *In the Matter of Pell*, 171 N. Y. 48, a statute was involved enacted in 1899 that imposed an inheritance tax upon all estates upon remainder or reversion which vested prior to the date of a previously enacted general inheritance tax statute but which would not come into actual possession or enjoyment until after the date of the enactment, to be taxed when the recipient came into possession. The statute was declared unconstitutional because its effect would be to "diminish the value of vested estates, to impair the obligation of a contract and take private property for public use without compensation" (p. 55). In the instant case the respondent's property in the $12,000 of income involved, became vested in him at the time he received it. Now to impose a tax upon it under the statute is to diminish its value, and to take property for public use without compensation precisely as much as did the New York statute stated.

In *Portunedo's Estate*, 20 Pa. Co. Ct. Rep. 419, an inheritance tax statute was involved that provided that "so much of estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this act shall be liable to the tax imposed by this law as well as the estates of persons who die hereafter." This was held unconstitutional on the ground that "when the right vested under existing laws is taxed by a subsequent law, for general purposes of government and not for any purpose specially benefiting the owner of such right, it is not only taking the property of such owner without compensation, but it is violating the other constitutional provision that taxes shall be equal." (p. 423). The

opinion quotes from 1 Kent 455: "A retrospective statute, affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."

It is stated in the opinion of the court that it has been held by this court and by the Supreme Court of the United States that income taxes are not void as retroactive if applied to recent transactions. The cases so holding were considering net income, as distinguished from individual items, and income received over a consecutive period next antecedent to the enactment of the taxing statute, not a period wholly disconnected with the time of the enactment and separated therefrom by an intervening period not subject to the tax imposed. It seems to me that the opinion of the court in effect concedes the invalidity of the retroactive feature of the tax when it says: "While the present tax may approach or reach the limit of permissible retroactivity it does not exceed it." It is not for the court to fix the limit of retroactivity. If income from dividends received in 1933 were properly subject to taxation why not those of 1932 or 1931? Why not go back to 1929, when dividends were many and large, instead of 1933, when they were few and small? The basis (1) of the court's rule by which to test the validity of the tax, that the year must be "sufficiently recent that the income of that year may reasonably be supposed to have some bearing on the present ability of the taxpayer to pay the tax," seems to be here absent. I see no connection between receipt of income from dividends in 1933 and present ability to pay a tax upon that item of income. Dividends of 1933 have "gone with the wind" by this time in all but comparatively few cases.

If it be conceded that because the dividends covered by the statute were not taxed as income during the year 1933 they might properly be subsequently taxed as *income* received during that year, the tax so imposed would have to be an income tax, computed at the income tax rate in force during that year, or the equal protection clause of the XIVth Amendment to the United States Constitution would be violated.

Dividends from Wisconsin corporations, which are the only ones within the statute, certainly cannot be taxed at a

higher rate than dividends from other corporations, else there is inequality. It is true that equality of rate within the class is the only equality necessary to validity of an income tax. But the mere fact that one corporation is a corporation organized under the laws of Wisconsin and another is a corporation organized under the laws of another state, cannot form a basis for taxing a recipient of a dividend fr the former and not taxing the recipient of a like dividend from the latter. Recipients of income constitute the class taxed under an income tax statute. If conceivably recipients of corporate dividends may constitute a separate class for income tax purposes, still all recipients of corporate dividends must constitute the class, not recipients of Wisconsin dividends only.

Under the instant section income from dividends is taxed at a rate entirely different from the rate imposed on incomes in 1933. A rate of taxation by the statute lower than the normal might conceivably be supported, because the corporation paid a tax on the earnings comprising the dividends, but a higher rate cannot possibly be. The first $2,000 of income under the statute involved would carry a slightly less tax than the normal tax, but on all above that the tax is higher. On the dividends received by the instant taxpayer the excess under the statute over the normal rate of 1933 is over $200. Moreover, taxpayers under the normal income tax law were entitled to offset capital losses. Such offset is denied by the instant statute. The instant taxpayer had large capital losses then deductible under the normal income tax statutes.

Counsel for respondent seem to contend in their briefs that the uniformity clause of the state constitution does not apply to income taxation because graduated rates of taxation are expressly provided for. But we have here something more than graduated rates. One class of income is taxed by one table of graduated rates, without deductions for capital losses, while all other kinds of income were taxed in 1933 at lower graduated rates with deductions for such losses. True the uniformity clause when the constitution was adopted applied only to property taxation because that taxation was the only kind then covered by the clause. See Art. VIII, sec. 1, as contained in the statutes of 1858. But

when the section was subsequently amended by adding thereto, the declaration of uniformity carried through, and it applies to all other species of taxation subsequently provided for, except as especially excepted by the terms of the amendment. This point is sufficiently covered by *Nunnemacher* v. *State*, 129 Wis. 190, 220, 108 N. W. 627, where it is said: "uniformity of taxation or even equality of taxation as applied to excise taxes must necessarily mean taxation which is not discriminatory but which operates alike on all persons similarly situated." There is the broad statement in *Appeal of Van Dyke*, 217 Wis. 528, 259 N. W. 700, that the uniformity clause does not apply to income taxes, but that is forthwith qualified by the statement that "the only uniformity required is uniformity within the class," and this implies a proper classification.

The inequalities above stated made the tax imposed upon the respondent void if it be considered as an income tax. The tax is referred to in the opinion of the court as a "special income tax." But it is not in my opinion an income tax at all but a property tax, and considered as such it is plainly violative of the uniformity clause of the state constitution. An income tax is a tax on income as a whole, not on individual items of income. It is a tax on net income, as distinguished from gross, and in computing it all items of income must be included. It has been said by this court several times that "In arriving at this amount (of the tax) the legislature takes the gross income of the taxpayer." *Fitch* v. *Wisconsin Tax Comm.*, 201 Wis. 383, 230 N. W. 37; *Wisconsin Ornamental I. & B. Co.* v. *Wisconsin Tax Comm.*, 202 Wis. 355, 229 N. W. 646. By "gross" income is there meant "total net" income as distinguished from gross receipts. The statement above quoted is made in relation to the normal income tax, but it necessarily applies to any tax that is an income tax as distinguished from other forms of tax. This court has also many times stated that the word "income" used in the constitutional amendment including income as a subject of taxation must be taken in its ordinary sense, and in its ordinary sense income means net income. It covers gains or profits and these cannot be ascertained from any single item of income. Income is defined in refer-

esce to income taxation as "the *amount* of wealth which comes to a person within a given period of time." 26 Ruling Case Law 147. "In constitutional and statutory provisions in regard to taxation . . . income appears to be uniformly construed as meaning net income, as opposed to gross receipts," Id. 149. With like reason it must be so construed as opposed to mere items of income. "Income means the balance of gain over loss," Id. 150. "The income tax is a general tax on all income." *Hudson* v. *U. S.*, 12 Fed. Suppl. 620. The "amount of wealth" acquired during a given period is not measured by a single item of income; "balance of gain over loss" cannot be based on a single item of income; a tax on a single item of income is not "a general tax on all income." The tax involved is a tax on a specified item of money received during the year, and as much a property tax as a tax on any other item of personalty received during the year would be, and if taxed at all would have to be taxed under the uniformity clause as other items of taxable personalty are taxed, unless there be a valid ground of distinction between money received as income and other items of personalty. Income from dividends might perhaps be so distinguished from some other items of income as to justify taxing the former and not the others, but I can conceive of no possible basis of classification as between dividends and interest. Whatever of distinction may be made between these two items would require dividends to be exempted rather than interest, for the source of the dividend—corporate earnings—has already been once taxed against the corporation, while the source of interest—the debt on which it is paid—has not been taxed at all. Whatever its nature may be considered to be the tax assessed against the respondent was in my opinion void under the uniformity clause of the state constitution and the equality clause of the XIV. th Amendment of the constitution of the United States and the judgment of the circuit court should be affirmed.

I am authorized to state that Mr. Justice Nelson concurs in this opinion.

EXHIBIT "D".

IN SUPREME COURT STATE OF WISCONSIN

AUGUST TERM, 1936.

No. 23.

EARLE S. WELCH, *Respondent*,

v.

ROBERT K. HENRY, State Treasurer, *Appellant*.

FAIRCHILD, *J.* (dissenting):

I cannot agree with the majority. It seems to me that the limits of the powers conferred upon the legislature by the people have been exceeded in this particular. It has never been considered fair play to impose burdens or penalties by later legislation upon a fellow citizen for an act or transaction which was lawful at the time of its occurrence, and the power to do that was withheld from governmental agencies by the people. The idea is not a new one and was not at the time of the formation of this government. Due process and the law of the land as legal concepts calculated to protect individuals in their lives and property have been parts of charters of freedom at least since the time of Conrad II (the Salic), who reigned from 1024 to 1039. In Mott's work on Due Process of Law, p. 1, he says with reference to an edict of that reign providing that no man be deprived of his fief, but by the laws of the empire and the judgment of his peers,

> "sixteen states of the United States have incorporated a literal translation of a portion of this canon into the fundamental law and fully as many more use phrases of similar import."

The thirty-ninth section of the Magna Carta reads, *Ibid*, p. 3,

> "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."

Sec. 6, ch. 15, Laws of 1935, is retroactive. I think it must be conceded that the taxpayer in this case had fully discharged all claims against him and his income under the law of 1933. Since this is so, his income for that year had been earned, taxed, and discharged of all obligations as income, and, under the "pattern of the income tax law", had passed from its status as income into the taxpayer's estate. Its character as income had vanished and whatever was left of it was no longer income, but was property and a part of the taxpayer's holdings or his estate. It has been decided that the legislature may constitutionally authorize the tax commission to go back several years for the purpose of reassessing incomes and correcting errors and eliminating frauds in previous returns. *State ex rel. Globe Steel Tubes Co.* v. *Lyons*, 183 Wis. 107, 197 N. W. 578. A legislature would not, of course, be acting under such constitutional power in levying a tax upon income not previously taxed at all. The power is merely that of collecting sums due since the tax was originally levied. It was held in *State ex rel. Globe Steel Tubes Co.* v. *Lyons, supra*, that this power included power retroactively to require payment of interest on back taxes from the date when they became due.

The legislature has also been upheld in levying new taxes on income already, but recently, earned. If this power to go back in levying new taxes is unlimited as to time, the tax in question would be valid. Can the legislature on March 14, 1935 levy a new tax upon incomes received during the calendar year 1933, or corresponding fiscal year? On July 13, 1911 the legislature imposed a tax on incomes received during the calendar year 1911. This act was upheld in *The Income Tax Cases*, 148 Wis. 456 at 514, 134 N. W. 673, 135 N. W. 164. On August 17, 1927, a tax was imposed upon incomes received in the calendar year 1926, and it was held valid in *West* v. *Tax Comm.*, 207 Wis. 557, 242 N. W. 165. In this case the tax on incomes received during 1926 as imposed by the law passed in 1925 was in the midst of the process of assessment when the 1927 law was passed.

Cooper v. *United States*, 280 U. S. 409, lays down the test that gains from "prior but recent transactions" may be

taxed as income. No case holds, and, with one exception, no case suggests, that the legislature may constitutionally impose a tax upon income received during a year, the taxes for which have been assessed and paid. *Stockdale* v. *The Insurance Companies*, 87 U. S. 323, holds good a tax imposed by Congress on July 14, 1870, on incomes received during the period from January 1, 1870 to August 1, 1870, but at page 331, the court says:

> "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent. upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

Apart from the quoted remark in the *Stockdale* case, there is no authority for holding that after an income tax on income received during a given year has been assessed and collected, the legislature may constitutionally tax the income received that year to a further extent. Fairness suggests that when a taxpayer's tax on one year's income has been assessed and paid according to the law then in force, the taxpayer is justified in concluding that the matter is closed except for fraud or erroneous assessment. The power of the legislature to provide for the collection of taxes which validly should have been assessed under the existing law, but which were omitted because of fraud or mistake, cannot be doubted, but that power does not support the law here in question. There is no claim of fraud as a reason for reexamining and reassessing this income of 1933, but the legislature in 1935 seeks to reach into a citizen's present estate and lay a tax, called an income tax, on that portion of his present property which was income during 1933, but not thereafter, and by such so-called income tax, compel him to disgorge a sum of money into the com-

mon treasury. That he may be able to afford it is no more a sufficient excuse for the usurpation of power than is the great need by the treasury of money. Even though the need be great, constitutional rights should not be invaded. A desire for material to patch a leak does not warrant tearing away structure that prevents inundation.

> "When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely." Cooley, Constitutional Limitations, (7th ed.) p. 505.

Civilized countries, enlightened nations have protected and preserved the rights of its citizens, encouraged thrift and the honest accumulation of resources. Laws relating to acts and events to occur in the future are acceptable and may be justified in taxation under the fundamental policy of protecting the rights of all and preserving the integrity of the government, but impositions on closed transactions cannot long be tolerated in a free government. Mr. Justice Story in the case of *The Society for Propagating the Gospel v. Wheeler*, 2 Gall. 139, defined a retroactive or, as he called it, a retrospective law:

> "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed must be deemed retrospective."

I have adverted to the fact that the taxpayer's 1933 income discharged itself of impositions then existing. The majority opinion suggests many subtle differentiations, but these do not appear to me to build a substantial difference between the closed act which is beyond the reach of the legis-

lature and that particular situation of which the taxpayer complains.

I do not feel any practical purpose can be served by further discussion of the point. The feeling that persons who have income from dividends from Wisconsin corporations have escaped taxation long enough may exist, but such escape was purposely permitted by the legislature in the belief that a sufficient tax on that earning had been paid by the corporation. Income from such dividends might be taxed from 1935 on, but for the years that had closed, the legislature was precluded by its own determination that such income was sufficiently taxed at its source. Citizens acted in reliance upon the assurance of the government that if each did all the existing law required him to do, he need not worry about completed acts.

The objections to the act here outlined, together with those advanced by Mr. Justice Fowler in the dissent by him and Mr. Justice Nelson, sufficiently disclose the reasons for my not concurring in the majority opinion.

EXHIBIT "E".

IN SUPREME COURT, STATE OF WISCONSIN.

JANUARY TERM, 1938.

No. 72.

EARLE S. WELCH, *Appellant*,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, *Respondents*.

Appeal from a judgment of the circuit court for Eau Claire County: James Wickham, Circuit Judge. *Affirmed.*

This action was begun by Earle S. Welch, Plaintiff, against Robert K. Henry and Solomon Levitan as Treasurer of the State of Wisconsin, defendants, to recover certain taxes paid by the plaintiff under protest. There was

a demurrer to the complaint. The demurrer was sustained. The plaintiff did not amend and judgment was entered on October 27, 1937, dismissing the plaintiff's complaint, from which judgment the plaintiff appeals.

Per CURIAM.

This case was before this Court and reported in *Welch* v. *Henry* (1937), 223 Wis. 319, 271 N. W. 68, to which reference is made for a statement of facts. On the former appeal and upon this appeal the plaintiff contends that the statute in question offends Sec. 1 of the fourteenth amendment to the constitution of the United Sates. Upon the former appeal this Court considered and rejected the plaintiff's contention that the act in question violated his rights under sec. 1 of the fourteenth amendment to the constitution of the United States. We have reconsidered plaintiff's contention and find nothing in the act violative of the plaintiff's rights under said section 1 of the fourteenth amendment. Reference is made to the opinion in that case and for the reasons there stated the judgment appealed from is affirmed.

Judgment affirmed.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. [redacted] 13

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS THE APPEAL.

JOHN M. CAMPBELL,
Attorney for Appellant.

SUBJECT INDEX.

Statement of the situation presented by the record..... 1

Respects in which equality clause of the Fourteenth Amendment was violated 3

Respects in which due process clause of the Fourteenth Amendment was violated..... 5

Argument

The record discloses color of foundation for asserting a violation of the equality and due process clauses of the Fourteenth Amendment..... 6

The fact that the trial judge and three of the seven Supreme Court Justices upheld appellant's contentions indicates that they are not frivolous or devoid of merit 7

The questions presented are not foreclosed by any prior decisions of this court..... 7

CASES CITED.

Air-Ways El. A. Co. vs. Day, 266 U. S. 71..... 8

Colgate vs. Harvey, 296 U. S. 404.....4, 8

Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308..... 6

F. S. Royster Guano Co. vs. Virginia, 253 U. S. 412..... 8

Louisville Gas & El Co. vs. Coleman, 277 U. S. 32.....4, 8

Nat. L. Ins. Co. vs. United States, 277 U. S. 508..... 8

New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336, 344 6

Travis vs. Yale & Town Mfg. Co., 252 U. S. 60..... 8

Zucht vs. King, 260 U. S. 174..... 7

TEXT BOOKS CITED.

12 C. J. 957 Sec. 496 5

STATUTES CITED.

Sec. 2, Chapter 15 Laws of Wisconsin for 1935 2
Sec. 6, Chapter 15 Laws of Wisconsin for 1935 2
Sec. 71.04 (4) Statutes of Wisconsin 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No.....

EARLE S. WELCH,

Appellant,

vs.

ERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS THE APPEAL.

Pursuant to Paragraph 3 of Rule 12 of the Rules of this urt, appellee has filed a Statement opposing appellate risdiction, and has included a motion to dismiss the ap-

peal. The motion for dismissal of the appeal is made upon the ground that no substantial federal question is presented thereby.

The appeal is from a judgment of the Supreme Court of the State of Wisconsin reported at 223 Wis. 319 sustaining the validity and constitutionality of Section 6, Chapter 15 of the Laws of Wisconsin for the year 1935 against appellant's objection that the same violated Section 1 of the Fourteenth Amendment to the Federal Constitution. The material portions of the enactment are set forth in appellees statement opposing appellate jurisdiction.

Briefly stated, the situation is this: By Sec. 71.04 (4) of the general income tax law prevailing in Wisconsin for a number of years last past, including the year 1933, it had been and still is provided that, for normal tax purposes, persons other than corporations, in reporting income, shall be allowed, among other deductions from gross income, a deduction for dividends received from Wisconsin corporations. In the year 1935 the legislature passed Chapter 15, Laws of Wisconsin for 1935. By Sec. 2 of Chapter 15 an emergency relief income tax was levied on 1934 income including, among other things, all dividends from whatsoever source derived. By Sec. 6 of Chapter 15, which was entitled "Emergency Relief Tax on certain 1933 dividends", another emergency income tax was levied on all persons, other than corporations who had received dividends in the year 1933 from Wisconsin corporations. Nothing else was to be taxed under Section 6. Both Section 2 and Section 6 provided for a progressive rate of taxation. The rate of taxation under Section 2 was the same as the rate applicable to 1934 income under the general income tax law. The rate of taxation under Section 6 was differently graduated as well as higher.

Appellant, in the year 1933, had gross income from all sources in the amount of $13,383.26. Of this amount $12,133.60 was dividends from Wisconsin corporations, not subject to income tax for normal tax purposes. He had deductions properly allowable for normal tax purposes in the amount of $11,061.97, leaving him an actual income in 1933 of $2,321.29. He also had an allowable deduction of $100 for donations. As a result, appellant had no net income whatever in 1933 subject to normal tax. Pursuant to the provisions of Sec. 6 of Chapter 15, Laws of 1935 an emergency income tax was assessed against appellant on account of the $12,133.60 dividends which he had received from Wisconsin corporations in 1933. The tax, at the rates provided for by Section 6 (which, as heretofore stated were different and higher rates than those provided for by the general income tax law or by Section 2 of Chapter 15) amounted to $545.71. This tax he paid under protest and then sued to recover it back, claiming that Sec. 6 of Chapter 15 Laws of 1935 violated certain provisions of the Wisconsin Constitution as well as Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The record presents the question whether Sec. 6 of Chapter 15 Laws of Wisconsin for 1935 is repugnant to either the equality clause or the due process clause of the Fourteenth Amendment or to both of these clauses. Appellant contends that it was repugnant to both. It is claimed that Sec. 6 of Chapter 15 violated the equality clause in that it was an attempted classification for taxation purposes which was arbitrary and unreasonable, which did not rest upon any ground of difference, having a fair and substantial relation to the object of the legislation and which did not treat alike all persons similarly circumstanced. That such a classifica-

tion would be repugnant to the equality clause of the Fourteenth Amendment is well established.

Louisville Gas & El. Co. vs. Coleman, 277 U. S. 32, 37.
Colgate vs. Harvey, 296 U. S. 404.

The attempted classification is claimed to have been discriminatory, arbitrary and unjust in the following respects:

(1) Section 6 of the Act levied an emergency income tax on dividends received from Wisconsin corporations, but not on dividends received from any other source.

(2) It levied an emergency income tax on persons receiving dividends from Wisconsin corporations in 1933, but did not levy a similar tax against any person on account of the receipt by him of any other kind of income in 1933.

(3) Section 6 of the Act levied an emergency income tax on dividends received from Wisconsin corporations in 1933, and by Section 2 of the Act the same stockholders, together with all other income taxpayers, were subjected to another and additional emergency tax on their 1934 income, including dividends of that year from whatever source derived.

(4) Section 6 of the Act arbitrarily discriminated between the recipients of dividends from Wisconsin corporations in 1933 and the recipients of similar dividends in other years prior to 1935, though the recipient of such dividends in 1933 bore no peculiar relation to the burden of relief in 1935 and had no peculiar ability to pay in 1935 as compared with recipients of such dividends in other years prior to 1935.

(5) Section 6 of the Act prescribed a different and higher rate of taxation on dividends received from Wisconsin corporations in 1933 than the rate which was applicable to other income in the year 1933, whether from dividends or otherwise, and a different and higher rate than that applicable to income including dividends received in 1934 and

taxable under Section 2 of the Act, and a different and higher rate than that applicable to 1934 income, including dividends, under the general income tax law.

(6) Section 6 of the Act imposed an emergency relief tax upon the dividends received from one particular source having no reasonable relation to nor reflecting the taxpayer's actual income or ability to pay, thereby placing an unequal burden upon the several members of the class created by Section 6.

The legislation in question is further claimed to have violated also the due process clause of the Fourteenth Amendment for the following reasons:

(1) Because it operated retroactively and in 1935 subjected to taxation income which in 1933 had been exempt, and which was not income received during a period next antecedent to the enactment nor income received within such a "recent" period as to have some connection with the time of the enactment.

(2) Because appellant had paid the tax assessable and assessed against his 1933 income according to the law then in force. His 1933 income had ceased to be income and had become capital, and to tax it in 1935 was an arbitrary impairment of his vested rights. Vested property rights are protected against state action by the provisions of the Fourteenth Amendment that no state "shall deprive any person of life, liberty or property without due process of law" (12 C. J. 957 Sec. 496).

It seems to us that the case at bar presents none of those features which characterize the cases where it was held that no substantial constitutional question was presented. The jurisdiction of the court is invoked upon the ground that ap-

pellant's right to equality under the law and to due process of law, has been invaded. Appellant is not seeking merely to question the wisdom or merit of the particular legislation involved. He does not complain merely of an ill-advised or burdensome law otherwise within the legitimate sphere of legislative power. He is seeking to have the court determine, not whether the State Supreme Court erred in its construction of Section 6 of Chapter 15, Laws of 1935, but whether the legislation is repugnant to the constitution of the United States. There is something more involved than simply a question as to the right of the state to withdraw a privilege gratuitously granted. Appellant contends that the situation presents a case of arbitrary spoliation of property. We believe the record discloses that there exists some color of foundation and some fair ground for asserting a violation of the equality and due process clauses of the Fourteenth Amendment, and that there is presented a real and not a merely formal federal question. That appears to be one of the well recognized tests for determining whether a substantial question is presented.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336, 344.

Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308.

In this connection we regard it as worthy of mention that the sole controversy between the parties in the state court was as to whether or not the Act of 1935 violated certain provisions of the State constitution and the equality and due process clauses of the Fourteenth Amendment to the Constitution of the United States. These were the sole questions presented for decision either in the trial court or in the State Supreme Court and they were passed upon and

decided by both of these tribunals. The trial judge deemed it unnecessary to pass upon all of the contentions raised by appellant and placed his decision in favor of appellant upon the ground that the Act in question was unconstitutional because it denied to appellant and to other persons who received dividends in the year 1933 the equal protection of the law. He filed with his decision an elaborate and exhaustive opinion which is a part of the record here, and in which he stated at length the reasons that compelled him to this conclusion. On appeal to the State Supreme Court that court reversed the trial judge, but three of the seven justices of the Supreme Court dissented from the majority and were of the opinion that the Act of 1935 violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as well as the due process clause of that amendment for the reason and upon the grounds stated in detail in the two dissenting opinions filed by them and likewise made a part of the record herein. It appears to us that this diversity of opinion between the four majority justices on the one hand and the three minority justices and trial judge on the other hand, of itself, is a persuasive circumstance that the contentions of appellant are not to be considered so manifestly frivolous and so devoid of merit that the court will reject them at a glance.

Furthermore, so far as we have been able to find, the questions raised by appellant on his appeal to this court have not been foreclosed by a prior decision or decisions of this court, in consequence of which it could be claimed that no further room is left for real controversy, which seems to be recognized as another test of the existence of a "substantial constitutional question." (Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308, Zucht vs. King, 260 U. S. 174). We

know of no case in this court where the precise questions here presented were decided adversely to appellant's contentions. On the contrary, such cases as we have been able to find bearing upon the claimed violation of the equality clause of the Fourteenth Amendment would appear to uphold appellant's contentions.

Colgate vs. Harvey, 296 U. S. 404.
Nat. L. Ins. Co. vs. United States, 277 U. S. 508.
Louisville Gas & El. Co. vs. Coleman, 277 U. S. 32.
Air-Ways El. A. Co. vs. Day, 266 U. S. 71.
F. S. Royster Guano Co. vs. Virginia, 253 U. S. 412.
Travis vs. Yale & Town Mfg. Co., 252 U. S. 60.

Appellant, therefore, believes that his appeal presents a substantial constitutional question.

Respectfully submitted,

JOHN M. CAMPBELL,
Attorney for Appellant.

IN THE

Supreme Court of the United States

October Term 1938.

No. 13.

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPELLANT'S BRIEF.

JOHN M. CAMPBELL,
Attorney for Appellant.

TABLE OF CONTENTS.

	Page
OPINIONS OF THE COURT BELOW	1
GROUNDS FOR JURISDICTION OF THE SUPREME COURT	2
STATEMENT OF THE CASE	2
ERRORS INTENDED TO BE URGED	3
STATUTES INVOLVED	4
SUMMARY OF ARGUMENT	6
ARGUMENT:	
A. PREVIOUS VOLUNTARY EXEMPTION OF DIVIDENDS FROM NORMAL INCOME TAX AFFORDS NO REASONABLE GROUNDS FOR CLASSIFYING THE RECIPIENTS THEREOF SEPARATELY AND SUBJECTING THEM TO A SEPARATE AND DISTINCT TAX	7
B. THE RATES OF TAX APPLIED TO THE DIVIDENDS BEAR NO REASONABLE RELATION TO THE NORMAL TAX OF WHICH THEY WERE RELIEVED AND ARE ARBITRARY AND DISCRIMINATORY	12
C. THE TRUE NATURE OF THE TAX AS A PROPERTY TAX, OR AN EXCISE, MAKES IT ARBITRARY AND DISCRIMINATORY BECAUSE OF THE GRADUATED RATES	15
D. THE RETROACTIVE EFFECT OF THE TAX HERE IN QUESTION RENDERS IT ARBITRARY AND DISCRIMINATORY	26

LIST OF CASES CITED.

	Page.
Adams Manufacturing Co. vs. Storen, ... U. S. ..., 58 S. Ct. 913	19
Billings vs. United States, 232 U. S. 261	27
Binney vs. Long, 299 U. S. 280	27
Blodgett vs. Holden, 275 U. S. 142	30
Brushaber vs. Union Pacific, 240 U. S. 1	27
Coolidge vs. Long, 282 U. S. 582	30
Cooper vs. United States, 280 U. S. 409	27
Dawson vs. Kentucky Distilleries, 255 U. S. 288	18, 22
Educational Films Corporation vs. Ward, 282 U. S. 379	15
Fawcus Machine Co. vs. United States, 282 U. S. 375	27
Federal Land Bank vs. Crosland, 261 U. S. 374	19, 20
Flint vs. Stone Tracy Co., 220 U. S. 107	26, 27
Florida Central R. R. Co. vs. Reynolds, 183 U. S. 471	26
Hale vs. Iowa State Board of Assessment and Review, ... U. S. ..., 58 S. Ct. 102	20
Hanover Fire Insurance Company vs. Harding, 272 U. S. 494	12
Hecht vs. Malley, 265 U. S. 144	26
Helvering vs. Helmholz, 296 U. S. 93	30
In re Cope's Estate, 191 Pa. 1	25
Lawrence vs. State Tax Commssion, 286 U. S. 276	11, 15, 17, 20
Louisville Gas & Electric Company vs. Coleman, 277 U. S. 32	7
Lynch vs. Hornby, 247 U. S. 339	27
Macallen Co. vs. Massachusetts, 279 U. S. 620	19

Memphis & Charleston Railway Company vs. Pace, 282 U. S. 241 8
Miller vs. Milwaukee, 272 U. S. 713 10
Milliken vs. United States, 283 U. S. 15 29
National Life Insurance Company vs. United States, 277 U. S. 508 19
New York ex rel Cohn vs. Graves, 300 U. S. 308 ..... 17, 20, 21
Nichols vs. Coolidge, 274 U. S. 531 30
Northwestern Mutual Life Ins. Co. vs. Wisconsin, 275 U. S. 136 19
Peck & Co. vs. Lowe, 247 U. S. 165 16
Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601 18
Redfield vs. Fisher, 135 Ore. 180 16
Royster Guano Company vs. Commonwealth, 253 U. S. 412 8
Schuster vs. Henry, 218 Wis. 506 25
Scobie vs. Tax Commission, 225 Wis. 529 9
Senior vs. Braden, 295 U. S. 422 ..... 15, 19, 30
Shaffer vs. Carter, 252 U. S. 37 17
State ex rel. Botkin vs. Welsh, 61 S. Dak. 593 23
Stewart Drygoods Company vs. Lewis, 294 U. S. 550 ..... 15, 24, 25
Stockdale vs. Insurance Companies, 20 Wall 323 27
Thompson vs. McLeod, 112 Miss. 383 22
Union Tank Line Company vs. Wright, 249 U. S. 275 11
United States vs. Hudson, 299 U. S. 498 ..... 18, 23, 28, 29
Untermeyer vs. Anderson, 276 U. S. 440 30
Welch vs. Henry, 223 Wis. 319, 340 (dissenting opinions) 10
White vs. Poor, 296 U. S. 98 30
Willcuts vs. Bunn, 282 U. S. [illegible] 19, 23

STATUTES CITED.

Chapter 29 Laws of Wisconsin 1931-1932 Special Session 8

Chapter 363, Laws of Wisconsin 1933 8

Sec. 71.04 (4) Wisconsin Statutes, 1933 ..... 5, 10

Sec. 71.05 (2) Wisconsin Statutes, 1933 13

Sec. 71.06 (1) Wisconsin Statutes, 1933 ..... 5, 13

Sec. 71.09 (4) Wisconsin Statutes, 1933 32

Sec. 71.26 (1) Wisconsin Statutes, 1933 13

Sec. 6, Chapter 15 Laws of Wisconsin 1935 ....2, 3, 4, 7

Chapter 15, Laws of Wisconsin 1935 ..... 2, 8

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EARLE S. WELCH,

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vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPELLANT'S BRIEF.

THE OPINIONS OF THE COURT BELOW.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin reported at *226 Wis. 595*. The questions involved in said appeal were originally considered by said Supreme Court of the State of Wisconsin upon an appeal to that court from an order overruling a demurrer to the original complaint. The opinions delivered upon said first appeal are reported at *223 Wis. 319*.

GROUNDS FOR JURISDICTION OF THE SUPREME COURT.

Paragraph 1 of Rule 12 has been complied with and a subsequent motion by the appellees to dismiss the appeal has been denied. The grounds on which the jurisdiction of the Supreme Court is invoked are therefore not here repeated.

STATEMENT OF THE CASE.

By Chapter 15 of the Laws of Wisconsin for 1935 the State of Wisconsin undertook, among other things, to raise money to be used for purposes of "Emergency Relief". To that end several taxes were levied by the Act in question. Included therein was the tax levied by Section 6 of said Chapter. This Act which was approved on the 14th day of March, 1935, and published March 27, 1935, purported in Section 6 to levy a tax at a graduated and progressive rate upon residents of the State of Wisconsin measured by the amount of dividends which they had received during the year 1933 from corporations specified in the Act. In general these corporations whose dividends were thus taxed were those corporations which themselves had paid such income taxes to the State of Wisconsin that their dividends had not been included in income subject to normal income tax by the State during the year 1933.

The appellant, a resident of the State of Wisconsin, received certain gross income during the year 1933 in the amount of $13,383.26, of which amount $12,156.10 was from dividends of Wisconsin corporations of the sort specified in Section 6 of Chapter 15 of the Laws of 1935 (Tr. 15). In the determination of his income subject to normal tax during the year 1933 plaintiff had been permitted to deduct

these dividends (Tr. 15). During that year he had other deductions properly allowable for purposes of normal tax, including taxes paid, interest paid, business expenses and capital losses in the amount of $11,061.97 (Tr. 15), leaving him with a net income during the year, including the dividends in question, of $2,321.29 (Tr. 15). Under the purported authority of Section 6 of Chapter 15 of the Laws of 1935 the appellant was required to pay an emergency relief tax in the sum of $556.84 (less discount for prompt payment) on account of his receipt during the year 1933 of the $12,156.10 of dividends which he had received (Tr. 16). This payment was made under protest and the present suit was brought for its recovery as specifically authorized by the Act in question. The grounds alleged in the complaint as the basis for such recovery were that said Section 6 of Chapter 15 of the Laws of 1935 was in violation of provisions of the Constitution of the State of Wisconsin and of the Fourteenth Amendment to the Constitution of the United States (Tr. 17). No disputed questions of fact are raised in the record. The appellees demurred to the appellant's amended complaint (Tr. 18), said demurrer was sustained and the judgment here appealed from was entered upon said demurrer (Tr. 19).

ERRORS ASSIGNED WHICH ARE INTENDED TO BE URGED.

The appellant intends to rely upon the following points which were set out in his "statement of points to be relied upon" filed at the time of granting the appeal (Tr. 22).

1. Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provisions

of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deny to any person within its jurisdiction the equal protection of the laws, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

2. Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

STATUTES INVOLVED.

The material portions of Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 are as follows:

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent."

The normal income tax referred to in the Court's opinion and in the argument herein is found in Chapter 71 of the Wisconsin Statutes for 1933. The rates appear at Section 71.06 and the deduction of dividends from Wisconsin corporations hereafter referred to is found in Section 71.04 (4) which reads as follows:

"Persons other than corporations, in reporting incomes for purposes of taxation, shall be allowed the following deductions. * * *

"(4) Dividends, except those provided in Section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this State. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by Caapter 71. * * *"

SUMMARY OF ARGUMENT.

A. The previous voluntary exemption of dividends from normal income tax affords no reasonable grounds for classifying the recipients thereof separately and subjecting them to a separate and distinct tax.

B. The rates of tax applied to the dividends bear no reasonable relation to the normal tax of which they were relieved and hence are arbitrary and discriminatory.

C. The true nature of the tax as a property tax, or an excise, makes it arbitrary and discriminatory because of the graduated rates.

D. The retroactive effect of the tax here in question renders it arbitrary and discriminatory.

ARGUMENT.

A. THE PREVIOUS VOLUNTARY EXEMPTION OF DIVIDENDS FROM NORMAL INCOME TAX AFFORDS NO REASONABLE GROUNDS FOR CLASSIFYING THE RECIPIENTS THEREOF SEPARATELY AND SUBJECTING THEM TO A SEPARATE AND DISTINCT TAX.

Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 creates a separate and distinct class of taxpayers consisting of the recipients, during a single year, of dividends from the corporations described in the Act. In considering whether this classification violates the provisions of the Fourteenth Amendment to the Federal Constitution there is little to be gained by considering in detail the name to be applied to the tax. Whether it be described as an income tax, a property tax, or an excise or privilege tax, it nevertheless establishes a separate class of taxpayers from whom a separate and distinct tax is demanded. It will be conceded that the Fourteenth Amendment permits classification in state legislation for purposes of taxation, as well as for other purposes, "provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." (*LOUISVILLE GAS & ELECTRIC COMPANY v. COLEMAN*, 277 U. S. 32, 37).

> "The latitude of discretion is notably wide in the classification of property for purposes of taxation. * * * Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

ROYSTER GUANO COMPANY v. COMMONWEALTH, 253 U. S. 412, 415.

"However the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, * * * and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause." *MEMPHIS & CHARLESTON RAILWAY COMPANY v. PACE*, 282 U. S. 241, 246.

Space does not permit a discussion of all of the numerous bases which have been considered from time to time in cases that have come before this Court and which have been held sufficient to justify some particular classification of taxpayers. Few of them are applicable here. The tax in question levied by Section 6 of Chapter 15 of the Laws of 1935 is in addition to and not in lieu of any of the other taxes levied in other sections of that Act, the proceeds of which are similarly devoted to "Emergency Relief" as set out in the Act. Although Chapter 15 of the Laws of 1935 is one of a series of taxing measures designed to raise funds for similar purposes in this and other years, no recipient of income or receipts during the year 1933 was required to pay any emergency or extra taxes under these similar measures. (See *Chapter 29, Laws of Wisconsin 1931-1932 Special Session, Chapter 363, Laws of Wisconsin 1933, Chapter 15, Laws of Wisconsin 1935.* These measures all laid emergency taxes on "net income" for various years. None of them cover the year 1933.) It does not appear that recipients of dividends from these particular sources made any undue contribution to the existence of the "Emergency" by reason of which they should be called upon to make a spe-

cial contribution to its relief. The fact that the Legislature referred to the tax in the title of the Act as an emergency tax is no ground for sustaining what might otherwise be an invalid classification.

"Expense for relief of the unemployed is on no different footing than any other governmental expense." *SCOBIE v. TAX COMMISSION*, 225 Wis. 529, 538.

The decision of the Supreme Court of Wisconsin on the first appeal, 223 Wis. 319, (Tr. 6) finds one and only one ground or basis for the reasonableness of the classification adopted by the Legislature and that was the fact that these taxpayers were not required to include these dividends in the determination of their net income for 1933 subject to the so-called "normal income tax". The Supreme Court of Wisconsin said:

"It is clear to us that there is but a single ground of differentiation, and that the classification must stand or fall upon this ground. Does the fact that the taxpayers who received dividends of Wisconsin corporations were exempt from a normal tax in 1933 so differentiate them from other persons receiving incomes during this year as to justify the subsequent levy upon them of a special income tax to meet a particular public emergency? * * * It is our conclusion that the fact that the income had previously been exempt from a normal tax is a sufficient reason for giving it different treatment upon the emergency tax. * * * In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income." (Tr. 9).

The Supreme Court of Wisconsin referred the following situation: For a number of years Wisconsin has had, as an

integral part of its revenue system, an annual income tax levied upon the net income of its taxpayers from all sources as defined in the statute. In determining the net income subject to this tax the taxpayers in each year, including the year 1933, have been allowed to deduct the amount of dividends received from corporations which themselves have paid a Wisconsin income tax upon fifty per cent or more of their total net income. *(Wisconsin Statutes, 1933, Section 71.01 (4)).*

These dividends which the taxpayer was allowed to deduct in 1933 in determining his net income subject to the normal tax levied for general revenue purposes are the same dividends which Section 6 of Chapter 15 of the Laws of 1935 proposes to make the basis for a separate tax. The fact that these dividends were deducted for purposes of determining net income subject to normal tax is the only reason which the Supreme Court of Wisconsin could find for the classification. This deduction was allowed as being equitable since the corporations paying the dividend had paid tax on their own earnings.

> "The deduction of dividends from these corporations has long been part of the income tax system of the State of Wisconsin."
>
> This exemption or deduction "was purposely permitted by the Legislature in the belief that a sufficient tax on that earning had been paid by the corporation."
>
> (Dissenting opinion of Justice Fairchild, *WELCH v. HENRY*, 223 Wis. 319, 340).

> "The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin, of income received by individuals in the form of dividends."
>
> (Concurring opinion of Justice Brandeis, *MILLER v. MILWAUKEE*, 272 U. S. 713, 717).

"The state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both." *LAWRENCE v. STATE TAX COMMISSION*, 286 U. S. 276, 284, discussing a similar provision in Mississippi.

In other words the Supreme Court of Wisconsin has found in the fact that the Legislature, as evidenced by a policy continued over many years, has, in the past, deemed that it would be inequitable to include dividends in net income subject to tax a basis for now placing the recipients of such dividends in a special class and subjecting them to a special tax.

If this so-called "exemption" from normal tax can be made the basis of a classification at all, there should be some relation between the amount of taxes exacted from this class and the benefits which have accrued to them by reason of having been allowed the deduction for purposes of normal tax, particularly when the exemption is the only basis for the classification.

"But if the plan pursued (a substitute basis for property tax) is purely arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the Commerce clause or the Fourteenth Amendment or both." *UNION TANK LINE COMPANY v. WRIGHT*, 249 U. S. 275, 282.

"Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subject to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic cor-

porations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies, in such a construction of paragraph 30, and in the practice under it. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws." *HANOVER FIRE INSURANCE COMPANY v. HARDING*, 272 U. S. 494, 516.

B. THE RATES OF TAX APPLIED TO THE DIVIDENDS BEAR NO REASONABLE RELATION TO THE NORMAL TAX OF WHICH THEY WERE RELIEVED AND HENCE ARE ARBITRARY AND DISCRIMINATORY.

The tax here involved is measured by nothing except the amount of dividends received and bears not the slightest relation to the net income of the taxpayer from all sources which is the subject of the normal tax, or to the amount of tax he would have been required to pay had dividends been included in the determination of his income subject to normal tax. Whatever may be said in favor of this classification for purposes of a tax measured by including dividends in taxable income during 1933, there is gross discrimination

in subjecting that class to a tax measured only by the amount of dividends regardless of the effect of other transactions of the taxpayer upon his taxable income, or upon the amount of normal tax which he would have been required to pay had the dividends been included in his income subject to such normal tax. The difference arises partly from the difference in rates. Normal income tax rates for 1933 income were graduated from one per cent to a maximum of six per cent on all net income over $12,000.00. (*Wisconsin Statutes 1933*, Section 71.06 (1)). In addition there was a Teachers Retirement Surtax of the maximum rate of one per cent. (*Wisconsin Statutes 1933*, Section 71.26 (1)). From the taxes thus determined the taxpayers were allowed an exemption stated not in terms of taxable income but in terms of dollars of tax and varying from $8.00 upward depending upon their marital status and number of dependents. (*Wisconsin Statutes 1933*, Section 71.05 (2)). The tax here in question is also levied at graduated rates. There is no exemption in dollars of tax but instead there is an exemption of $750.00 of "dividend income". Thereafter the rates run from one to seven per cent but the maximum rate of seven per cent applies to all dividends above $5,000.00. This manifestly results in great discrepancies between the amount of dividend tax and the normal tax upon a like amount of net income. The appellant, who received dividends of $12,156.10 was called upon for a tax of $556.84. Normal income tax and surtax upon that same amount of net income would have been $468.42 less his exemption.

It is true, as was pointed out by the Supreme Court of Wisconsin, (Tr. 10) that this is not necessarily a fair comparison because the taxpayer's dividends might come in on top of other income and if subjected to normal tax, result

in a higher tax than the tax actually imposed. Here, however, and in the case of many other taxpayers, the existence of business losses, the payment of taxes and interest, and other deductions give the taxpayer a net loss for purposes of normal tax, no part of which is allowed to be set off against the tax now imposed. His net income for normal income tax would have been $2,321.29 if he had not been allowed to deduct the dividends which he received. (Tr. 15) The tax on that amount would have been $27.32 less such exemption from $8.00 upward as he would have been entitled to by reason of his marital status, etc. Because these dividends were not so included and he saved that amount in taxes, the Supreme Court of Wisconsin now considers that this was a sufficient basis for requiring him to pay $556.84 in taxes because of the receipt of those dividends. If he had had a net income subject to normal tax from other sources of $12,000.00, together with the dividends which he did receive, his saving in tax would have been the full maximum rate of seven per cent upon those dividends, about $850.00. Yet he is required by Section 6 of Chapter 15 of the Laws of 1935 to pay the same amount as if he had the larger actual income.

Other factors may justify imposing heavier burdens upon one class of taxpayers than upon others, but when, as here, the only basis for the classification is the prior exemption, the burden of the tax should be somewhere in line with the benefits conferred by the exemption. To have made it so would have involved no undue difficulties of administration since the State had the returns of 1933 income showing both the taxable income for that year and the amount of dividends there deducted and here taxed. See opinion of the court below. (Tr. 11)

Even if the deduction of the dividends in the prior year furnished a permissible basis for some sort of tax, it furnishes none for this tax. The ground of difference bears no "just and proper relation to the attempted classification." The tax is a "mere arbitrary selection".

C. THE TRUE NATURE OF THE TAX, AS A PROPERTY TAX, OR AN EXCISE, MAKES IT ARBITRARY AND DISCRIMINATORY BECAUSE OF THE GRADUATED RATES.

In discussing the constitutionality of the action of the Wisconsin Legislature in setting recipients of dividends apart as a separate class subject to a separate tax, it is not particularly important to decide exactly what sort of tax is assessed against the class. However, when we come to consider the fact that the tax upon that class, even assuming that the classification itself is valid, is imposed at a graduated and progressive rate, it does become necessary to consider just what sort of tax this is. Section 6 of Chapter 15 of the Laws of 1935 refers to the tax as one upon "dividend income". The prevailing opinion in the Supreme Court of Wisconsin referred to it as an "income tax". (Tr. 13) This was its characterization, according to the State Court, as far as concerned its authorization by Section 1, Article XIII of the Wisconsin Constitution. Of course, the Supreme Court of the United States is not bound by the name given to the tax or its characterization either by the Legislature or by the state court.

EDUCATIONAL FILMS CORPORATION v. WARD, 282 U. S. 379, 387

STEWART DRYGOODS COMPANY v. LEWIS, 294 U. S. 550, 555

SENIOR v. BRADEN, 295 U. S. 422, 429

> "In passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *LAWRENCE v. STATE TAX COMMISSION*, 286 U. S. 276, 280.

It is true that the tax is measured by something that "comes in" to the hands of the taxpayer, namely, the dividends, but it is equally true that the tax is not one measured by a balancing of the net results of all the taxpayer's business transactions for the year. It is not a tax upon income, meaning thereby the gain or profit to the taxpayer from all of his business transactions as that term is used, for instance, in connection with federal income tax or the Wisconsin normal income tax. It is not laid upon what remains when "all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses." *PECK & CO v. LOWE*, 247 U. S. 165, 175.

> "Income taxes generally do not select as the measure of their levies the income from one source only and neglect all others." *REDFIELD v. FISHER*, 135 Ore. 180.

We have seen that in the case of this particular taxpayer there is no relation between the amount of dividends which he received and his income from all his business transactions during the year. Taxes upon the net income of the taxpayer during the year from all transactions are sustained and graduated rates of tax are found to be nondiscriminatory because the income as thus defined is a fair measure of the ability to pay according to the graduated rates.

> "Income taxes are a recognized method of distributing the burdens of Government favored because requiring contributions from those who realize current pecuniary benefits under the protection of the Government and

because the tax may be readily proportioned to their ability to pay." *SHAFFER v. CARTER*, 252 U. S. 37, 51.

"The tax (one on net income from all sources) which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income, etc." *LAWRENCE v. STATE TAX COMMISSION OF MISSISSIPPI*, 286 U. S. 276, 281.

"A tax measured by the net income of residents is an equitable method of distributing the burdens of Government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income, etc." *NEW YORK Ex Rel COHN v. GRAVES*, 300 U. S. 308, 313.

The Supreme Court of Wisconsin felt justified in characterizing this tax as an "income tax" as opposed to a tax which might be laid, for instance, upon gross receipts by reason of the fact that there are ordinarily few expenses in connection with the receipt of dividends so that there is not much difference between the gross receipts and the net receipts from that particular source. There is considerable doubt as to the correctness of this assumption. It is true that the taxpayer had no particular expense in connection with the mere collection of these dividends. However, he did sustain losses on the sale of other securities in the amount of $8,518.84. (Tr. 15) He is allowed no deduction for these losses although they go to reduce the net result of his proceeds as an investor. He paid interest during 1933 in the sum of $1,420.25 (Tr. 15) which amount might have been saved him had he chosen to dispose of the stock and pay the indebtedness upon which this interest was paid.

Even if it is true that the gross income from dividends may be considered as net income, the fact remains that when you measure the tax by receipts, whether gross or net, from some particular source, you are taxing something other than the net income of the taxpayer from all his activities during the taxable year. There does not exist the relationship between the receipts from a particular source and the ability to pay that exists in case of a tax based upon the net gain or profit of the taxpayer from all of his transactions during the year. In making this contention it is appreciated that in *UNITED STATES v. HUDSON*, 299 U. S. 498, this court characterized the tax imposed by the Silver Purchase Act of June 19, 1934, upon gains from a particular class of transactions regardless of other transactions of the taxpayer during the year as a "special income tax." However, it is to be noted that the tax there imposed was at a flat or uniform rate and the question here under consideration concerning the application of graduated rates to receipts from a particular source was not involved.

If the tax is not a tax upon "income" as that term is used in cases sustaining graduated taxes, then it should be considered either as a tax upon property or as some other form of excise. When the real nature and effect of the tax is considered, it is to all practical intents and purposes a property tax. There is only one measure of it, the amount of dividends received by the taxpayer from stock. To pick out this one source of receipts and levy a tax upon them is to directly tax the property from which the receipts are secured.

POLLOCK v. FARMERS LOAN & TRUST CO., 157 U. S. 429, 158 U. S. 601

DAWSON v. KENTUCKY DISTILLERIES, 255 U. S. 288

NORTHWESTERN MUTUAL LIFE INSURANCE CO. v. WISCONSIN, 275 U. S. 136

NATIONAL LIFE INSURANCE COMPANY v. UNITED STATES, 277 U. S. 508.

FEDERAL LAND BANK v. CROSLAND, 261 U. S. 374

MACALLEN CO. v. MASSACHUSETTS, 279 U. S. 620

WILLCUTS v. BUNN, 282 U. S. 216

SENIOR v. BRADEN, 295 U. S. 422

In *NORTHWESTERN MUTUAL LIFE v. WISCONSIN*, 275 U. S. 136, the court considered the validity of a Wisconsin Statute purporting to fix a license fee measured by a fixed percentage of gross income from all sources with certain exceptions not important here. The gross income so taxed included interest on federal bonds and this provision was held to be invalid.

> "To tax this would amount practically to laying a burden on the exempted principal." P. 140.

The force of this statement is not weakened by the holding in the recent case of *ADAMS MANUFACTURING CO. v. STOREN*, ... U. S. ..., 58 S. Ct. 913, which held that inclusion of interest on tax exempt municipal bonds in the "gross income" subject to an Indiana tax did not impair the obligation of contract. That determination depended upon the interpretation of the exemption statute, not upon whether the tax was one on property.

In *NATIONAL LIFE INSURANCE COMPANY v. UNITED STATES*, 277 U. S. 508, the court said:

> "It is settled doctrine that to directly tax the income from securities amounts to taxation of the securities themselves." p. 521.

In the dissenting opinion of Justice Brandeis in that same case, it was said:

"Directly to tax the gross income from securities amounts, of course, to taxing the securities themselves" p. 532.

In *FEDERAL LAND BANK vs. CROSLAND*, 261 U. S. 374, it was held that a tax on the recording of mortgages was a tax upon the mortgages themselves.

In *SENIOR vs. BRADEN*, 295 U. S. 422, it was generally conceded that the state tax there involved was a property tax upon an interest in land owned by the holders of trust certificates, although the measure of the tax was the income distributed to the certificate holders during the preceding calendar year.

The characterization of the tax as a property tax is in nowise weakened by the fact that in cases such as *LAWRENCE vs. STATE TAX COMMISSION*, 286 U. S. 276, and *NEW YORK ex rel COHN vs. GRAVES*, 300 U. S. 308, the tests of the constitutionality of a tax measured by net income including receipts from property have been held to be different than what would be applied to a property tax. Such taxes are true income taxes based upon the net result of all of the taxpayer's transactions during the year. They do not single out the receipts from a particular source to the exclusion of the results of any other business or activities.

In *HALE vs. IOWA STATE BOARD OF ASSESSMENT AND REVIEW*, ... U. S. ....., 58 S. Ct. 102, the court considered whether the provisions of an Iowa statute requiring the income from tax exempt municipal bonds to be included in arriving at net income subject to an income tax

violated the constitutional prohibition against impairing the obligation of contract. The court was confronted with the question of whether the provision in the Iowa statute that the bonds should be exempt from tax prevented the inclusion of the interest in taxable income subject to an income tax. The court particularly considered *NEW YORK ex rel COHN vs. GRAVES*, 300 U. S. 308 and its implications and came to the following conclusion:

> "Two rulings emerge as a result of the analysis. By the teaching of the Pollock Case an income tax on the rents of land (157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759), or even on the fruits of other investments (158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108) is an impost upon property within the section of the Constitution (article 1, par. 2, cl. 3) governing the apportionment of direct taxes among the states. 300 U. S. 308, at page 315, 57 S. Ct. 466, 468, 81 L. Ed. 666, 108 A. L. R. 721. By the teaching of the same case an income tax, if made to cover the interest on government bonds, is a clog upon the borrowing power such as was condemned in McCulloch vs. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and Collector vs. Day, 11 Wall. 113, 124, 20 L. Ed. 122, 300 U. S. 308, at pages 315, 316, 57 S. Ct. 466, 468, 469, 81 L. Ed. 666, 108 A. L. R. 721. There was no holding that the tax is a property one for every purpose or in every context. We look to all the facts."

The facts to which the court must look in considering the instant case are that the tax is not laid upon all net income and is not even laid upon all receipts. It is a separate and distinct tax laid only upon dividends from stock of certain corporations. Nothing else enters into the measure of the tax other than the amount of such dividends. A clearer case of taxing stock by purporting to tax the dividends could hardly be imagined.

Nor is the character of the tax as a property tax changed by considering it as an excise. The only events which have occurred which could possibly be considered as the subject of an excise are the continued holding of the stock by the taxpayers and the receipt by them of the dividends. No affirmative action of any kind is required on their part to subject them to the tax, nor have they any choice of action which would in any way affect the amount of tax they are required to pay.

In *DAWSON vs. KENTUCKY DISTILLERIES*, 255 U. S. 288, it was held that a tax upon the right to remove whiskey from bond amounted to a tax upon the whiskey itself.

> "The whole value of whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." p. 294.
>
> "To levy a tax by reason of the ownership of property is to tax the property." p. 294.

In *THOMPSON vs. McLEOD*, 112 Miss. 383, the State Court considered what purported to be a privilege tax upon the business of extracting turpentine from standing trees measured by a fixed amount upon each box cut. The statute was held to be invalid because it was in effect a property tax.

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural rght to extract gum from the tree as the owner of a vineyard has to pluck his own grapes."
>
> "Though the courts have gone far with the concept of taxable privilege, they have refused to extend it to any such point as this and have held that when this point is reached the concept has become so utterly fictitious that it can no longer serve as a legal screen that the

tax imposition is really upon the receipt which is nominally made the measure of the tax. The courts have therefore said that it is not permissible by any fiction of privilege to tax in fact the mere right of ownership of property or the legal incidents thereof."

STATE Ex Rel BOTKIN vs. WELSH, 61 S. Dak. 593.

"The mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property."

"The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever." *JENSEN vs. HENEFORD*, ... Wash. ...., 53 Pac. (2) 607, decided January 14, 1936.

The distinction between this situation and one of the sort involved in *UNITED STATES vs. HUDSON*, 299 U. S. 498, where net income from the single source of trading in silver bullion was allowed to be the subject of a special tax, is made clear in the case of *WILLCUTS vs. BUNN*, 282 U. S. 216. There the court held that profits derived from the sale of municipal bonds could be included in net income subject to federal income tax, although interest on the bonds could not, and said:

"It does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a non-discriminatory excise tax upon the profits derived from the sale of such bonds." p. 227.

"The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transactions on his part. The tax falls upon the owner by

virtue of the mere fact of ownership regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors." p. 227.

Whether the tax here involved is to be strictly denominated a property tax or not, where the measure of it is so closely bound up with the dividends which constitute the principal value of the stock, and the tax is claimed by reason of the mere ownership of the stock and the acceptance of those dividends when declared and paid, the questions as to the conformity of the taxing statute to the Fourteenth Amendment should be decided according to the same standards as would be applied in the case of an outright property tax.

It is assumed that there may be a valid classification of property for purposes of taxation but the application to the property in that class of varying rates results in an indefensible discrimination. The taxpayer who owns a thousand shares of stock and receives the dividends thereon, by that fact alone is required to pay a greater number of dollars per share owned than another taxpayer who owns but a hundred shares of that same stock. In *STEWART DRY-GOODS COMPANY vs. LEWIS*, 294 U. S. 550, the court in discussing the graduated rates applied by a Kentucky statute to a tax on gross sales said:

"Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned." p. 557.

"A pretended classification, that is based solely on a difference in quantity of precisely the same kind of

property, is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes, with the view of imposing a different tax rate on each,—class 1 consisting of personal property exceeding in value the sum of $100,000, class 2 consisting of property exceeding in value $20,000 and not exceeding $100,000, and class 3, consisting of personal property not exceeding in value $20,000—would be so manifestly arbitrary and illegal that no one would attempt to justify it." *In Re COPE'S ESTATE,* 191 Pa. 1, 22.

The case for the constitutionality of this tax is not improved by considering it as an excise tax. As we have seen it is a tax which bears no relation to the ability of the taxpayer to pay or to his net income from all sources. It is a tax upon the receipts, whether gross or net, from a particular source. That tax is levied at a progressive rate. A taxpayer owning two hundred shares of stock may very well be required to pay a higher rate upon the dividends received upon the second one hundred shares than those received upon the first. He may own stock in a corporation declaring dividends quarterly and be required to pay at a higher rate by reason of the receipt of the last dividend than he is required to pay by reason of the receipt of the first. It is difficult to distinguish any difference between such a situation and that presented in *STEWART DRYGOODS COMPANY vs. LEWIS,* 294 U. S. 550, and followed by the Supreme Court of the State of Wisconsin in *SCHUSTER vs. HENRY* in 218 Wis. 506. In that case the court sustained the contention that the Fourteenth Amendment was violated by a tax measured by gross sales and applied at a graduated rate. It pointed out the distinction between such a tax and a true income tax.

"Even in this aspect the classification is arbitrary, for the claimed relation of gross sales—the measure of the tax—to net profits fails to justify the discrimination between taxpayers." p. 558.

D. THE RETROACTIVE EFFECT OF THE TAX HERE IN QUESTION RENDERS IT ARBITRARY AND DISCRIMINATORY.

What has been said above has been without particular reference to the retrospective nature of the tax imposed by Section 6 of Chapter 15 of the Laws of Wisconsin for 1935. It has been pointed out that this act which was approved on March 14, 1935, imposed a tax measured by the dividends which had been received by the taxpayers during 1933. It thus purports to assess a tax based upon something that happened in the second preceding year and goes much further in that regard than any such taxing measures that have come to our attention. In considering the retroactive application of the statute, it must be borne in mind that this is not a curative or remedial statute having for its purpose collection of taxes actually assessed in the prior year but which for some reason had not been collected. In that respect it differs from such cases as *FLORIDA CENTRAL R. R. CO. vs. REYNOLDS*, 183 U. S. 471. It is not a remedial statute to confirm or ratify a questionable or improper administrative interpretation of some prior legislation and therefore differs from cases such as *HECHT vs. MALLEY*, 265 U. S. 144. It is not like such cases as *FLINT v. STONE TRACY CO.*, 220 U. S. 107, where income from a previous year was used to measure the contribution exacted by the state for the exercise of privileges during the current year. It is simply a tax authorized and levied during 1935 upon dividends which under the long existing policy of the state

had not been subjected to tax at all at the time they were received. During the year 1938 the state of Wisconsin had declared that it did not seek any taxes from these dividends. In 1935 it changed its mind about this and proposed to then take a tax which it had previously disclaimed and which it had previously thought it would be inequitable to collect.

It will be conceded that as far as the Federal Constitution is concerned, a taxing measure is not necessarily or automatically invalid by reason of the mere fact that it has some retrospective operation. Income tax measures have been held valid, although they include in their operation the income back to the beginning of the year in which they were passed. *LYNCH vs. HORNBY*, 247 U. S. 339, *COOPER vs. UNITED STATES*, 280 U. S. 409.

Changes in the rates, exemptions and other details of tax measures have been sustained although passed after the end of the year but before the tax measured by that year had been returned and paid. *FAWCUS MACHINE CO. vs. UNITED STATES*, 282 U. S. 375. Taxes upon incompleted transactions have been sustained although the transactions were commenced and decided upon before the Act was adopted. *BINNEY vs. LONG*, 299 U. S. 280.

Taxes for the exercise of a present privlege have been sustained although the amount of that tax is determined by reference to a period expiring before the Act was adopted. This is the basis for upholding the tax in cases such as *STOCKDALE vs. INSURANCE COMPANIES*, 20 Wall. 323, *FLINT vs. STONE TRACY CO.*, 220 U. S. 107. Retroactive measures imposing entirely new taxes may be valid when they apply to transactions during a period which had not yet expired when the measure was adopted. *BILLINGS vs. UNITED STATES*, 232 U. S. 261, *BRUSHABER vs.*

UNION PACIFIC, 240 U. S. 6; *UNITED STATES* ex. *HUDSON*, 299 U. S. 498.

Although the retrospective nature of the tax here involved may not automatically render it invalid, it does accentuate and bring into sharp relief the discriminatory nature of the tax. Even if it were entirely proper to classify recipients of dividends in a separate class and subject them to a separate and distinct tax, it would not follow that it would likewise be proper to constitute a separate class composed of those who had received dividends in the past.

If you go back far enough to find the basis for any sort of tax you reach a point where the property, privilege, or income made the basis of the tax is so far removed from conditions present at the time the tax is imposed and from the taxpayer's ability to pay at the time the tax is imposed that the basis can be considered only as arbitrary and discriminatory. The present tax was imposed in 1935 upon dividends received by the taxpayer in 1933. During the year when the dividends were received, the taxpayer had no intimation that he was going to be called upon for a tax out of them. He filed his income tax return in March of 1934 reporting the receipt of these dividends and still no tax was demanded from him on account thereof. The entire year 1934 went by and still no tax was demanded. In the meantime his ability to pay had been subjected to the results of whatever business transactions he had during 1934. In March of 1935 the State of Wisconsin came along and announced that it had changed its mind about not requiring tax on these 1933 dividends and at that time demanded it. The matter was well expressed in the dissenting opinion of Judge Fowler, 223 Wis. 319, 332:

> "If income from dividends received in 1933 were properly subject to taxation why not those of 1932 or 1931?

Why not go back to 1929 when dividends were many and large, instead of 1933, when they were few and small?"

In *MILLIKEN vs. UNITED STATES*, 283 U. S. 15, a provision of the Revenue Act of 1918 imposing higher rates of federal estate tax were held applicable to gifts made in contemplation of death in 1916 and included in the gross estate. The Court pointed out that at the time the gifts were made they were subject to inclusion in the gross estate and the donor making them took his chances of a later increase in the tax burden.

"The reasonableness of the present application of the increased rate of tax of the 1918 Act must be determined in the light of the legislative policy which the 1916 Act had established before the gift was made." p. 23.

The transaction in silver bullion upon which the taxpayer was required to pay a retroactive tax by the statute considered in *UNITED STATES VS. HUDSON*, 299 U. S. 498, took place while the Act in question was before Congress and the likelihood of its adoption was apparent. In the present case the legislative policy in 1933 was to exclude these dividends from tax. The action taken in 1935 reversing that policy took the appellant completely by surprise and imposed a tax by reason of a prior but not a "recent" transaction. Retroactivity of the taxing statute to that extent and over that period of time is in itself enough to violate the Federal Constitution.

It has been held that an attempt to include property which has been the prior subject of a completed gift intended to take effect at death in the gross estate subject to federal estate tax is in violation of the Fifth Amendment.

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the

challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall." *NICHOLS vs. COOLIDGE*, 274 U. S. 531, 542.

An attempt to include completed gifts made before the adoption of the Revenue Act of 1924 as the subject of the gift tax imposed by that statute was held unconstitutional, *BLODGETT vs. HOLDEN*, 275 U. S. 142, even where the gift was made at a time when the legislation was before Congress. *UNTERMYER vs. ANDERSON*, 276 U. S. 440. An interpretation of Section 302 (d) of the Revenue Act of 1926 requiring the inclusion in the gross estate subject to tax of property conveyed to an irrevocable trust which would not have been so included at the time the trust was created violates the Fifth Amendment. *HELVERING vs. HELMHOLZ*, 296 U. S. 93; *WHITE vs. POOR*, 296 U. S. 98.

In *COOLIDGE vs. LONG*, 282 U. S. 582, the court considered state legislation by the state of Massachusetts which purported to subject to inheritance tax certain interests under trusts which had been irrevocably established before passage of the statute and which had given rise to no tax liability at the time of their creation. It was held that retroactive effect of the legislation violated the Fourteenth Amendment of the Federal Constitution.

"No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment." p. 599.

"This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment." p. 600.

The Supreme Court of the State of Wisconsin in the prevailing opinion, contented itself with saying:

> "It is our conclusion, (1) that under this rule the legislature may measure an income tax by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax; and (2) that the legislature, subject to this limitation, may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total return of the tax to the state. While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it." Tr. 11.

As to the first of these tests, the relationship between the period and ability to pay, it would seem that this tax when so tested should fail rather than be sustained. It is certainly not the experience of the writer and I doubt if it is the experience of very many, that the receipt of dividends or any other receipt during the year has any bearing upon the ability to pay during the second succeeding year. The matter was aptly put in the dissent of Justice Fowler, 223 Wis. 319, 332:

> "The basis (1) of the court's rule by which to test the validity of the tax, that the year must be 'sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax,' seems to me to be here absent. I see no connection between receipt of income from dividends in 1933 and present ability to pay a tax upon that item of income. Dividends of 1933 have 'gone with the wind' by this time in all but comparatively few cases."

In setting up the second test, that the legislature can go back "to the most recent year for which they have returns

furnishing a basis upon which to estimate the total return of the tax to the State", the court has substituted the convenience of the State for the rights of the taxpayer as the standard to be complied with. The returns referred to were apparently the returns for the purpose of determining normal income tax which all Wisconsin taxpayers are required to file on the 15th day of March in each year. The returns covering income for 1934 were due on March 15, 1935. Wisconsin Statutes, Section 71.09 (4). Section 6 of Chapter 15 of the Laws of 1935 was approved on the 14th day of March, 1935, the day before the returns covering income for 1934 were due. It was published and became effective March March 27th, twelve days after the returns were due. Under the rule fixed by the court this tax, merely because of its retroactive features, would have been invalid had it been passed the day after it was approved. It may be very well from the standpoint of the convenience of the legislature to fix such a standard, but this does not do the taxpayer any good. The tax is just as far removed from any reasonable basis and is just as arbitrary an enactment on the 14th day of March, 1935, as it is on March 15th.

It is apparent that if you go back far enough to select the time during which you are going to measure the tax, you must come to a point where there is so little relation between the income during the period involved and the taxpayer's ability to pay or any other element constituting any reasonable grounds for demanding a tax, that the effect is an arbitrary imposition which is beyond the legislature's power. That point has been reached when the legislature purports to impose a tax upon receipts for the second preceding year, a period for which taxes have already been levied and paid. When the taxpayer on March 15, 1934, filed his return of

income tax showing no tax demanded from him at that time, he was justified in assuming that his account with the state for that particular year had been settled and that his receipts for that year might be safely placed in his capital account. It is difficult to see how the imposition of a tax in 1935 upon these dividends amounts to anything except a property tax upon the receipts themselves. When the dividends reached the taxpayer's hands by transactions upon which the state was not then claiming any tax, they became so much property in his possession and no different from other dollars in the hands of other taxpayers that had come in some other manner. The singling out of this property in the hands of the appellant for taxation when other dollars were not taxed is an arbitrary discrimination.

CONCLUSION.

For the reasons herein stated the appellant submits that Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 has the effect of taking his property without due process of law and denying to him the equal protection of the laws and is therefore in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States and that the holding of the Supreme Court of the State of Wisconsin to the contrary should be reversed.

Respectfully submitted,

JOHN M. CAMPBELL,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 13

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ORLAND S. LOOMIS,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin;
JOSEPH E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Nature of the case	1
No substantial Federal question is presented	4
The matter presented is one of purely local concern	4
No Federal privilege or immunity is denied by the State decision	7
Appellant's claim that rights under the Federal constitution have been violated, is without merit for the reason that he is dealt with under the State statute in the identical way all other taxpayers similarly situated are treated	8
There is no denial of due process as adequate legal proceedings are provided in the statute	9
The decision of the State court was so plainly right as not to require argument	10
Motion to dismiss or affirm	13

Table of Cases Cited.

American Ry. Express Co. v. *Commonwealth of Ky.*, 273 U. S. 269, 47 Sup. Ct. Rep. 353, 71 L. Ed. 639	5
Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. Rep. 553, 63 L. Ed. 1058	6
Great Northern R. Co. v. *Alexander*, 246 U. S. 276	9
McElvaine v. *Brush*, 142 U. S. 155, 12 Sup. Ct. Rep. 156, 35 L. Ed. 971	6
Mackay Tel. & Cable Co. v. *Little Rock*, 250 U. S. 94, 39 Sup. Ct. Rep. 426, 63 L. Ed. 863	6
Manhattan L. Ins. Co. v. *Cohen*, 234 U. S. 123	5
Mo. K. & T. R. Co. v. *West*, 232 U. S. 682, 34 Sup. Ct. Rep. 471, 58 L. Ed. 795	6

Page

New York, ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 Sup. Ct. Rep. 61, 73 L. Ed. 184 7
Parker v. *McLain*, 237 U. S. 469 9
Quong Ham Wah Co. v. *Ind. Accid. Com'sn. of Calif.*, 255 U. S. 445, 41 Sup. Ct. Rep. 373, 65 L. Ed. 723 5
Ross v. *Oregon*, 227 U. S. 150 5
Rowan v. *Runnels*, 5 How. 134 5
Spies, Ex parte, 123 U. S. 131 11
Swafford v. *Templeton*, 185 U. S. 487 9
Tampa Waterworks Co. v. *Tampa*, 199 U. S. 241, 26 Sup. Ct. Rep. 23, 50 L. Ed. 170 5
Welch v. *Henry et al.*, 223 Wis. 319, 271 N. W. 68 4
Wilson v. *No. Car. ex rel. Caldwell*, 169 U. S. 586 9
Yazoo M. V. R. Co. v. *Brewer*, 231 U. S. 245, 34 Sup. Ct. Rep. 90, 58 L. Ed. 204 6
Zucht v. *King*, 260 U. S. 174, 43 Sup. Ct. Rep. 24, 67 L. Ed. 194 7

STATUTES CITED.

Constitution of the United States, 14th Amendment, Section 1 4
Laws of Wisconsin, 1935, Chapter 15, Section 6, subdivision 5 of para. (c) of subsec. (1) 2, 3, 4, 9
Wisconsin Constitution, Article I, Section 13 3
Article VIII, Section 1 2
Wisconsin Income Tax Law (Ch. 71, secs. 71.01 to 71.26, Wisconsin Statutes, 1933) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 888

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN.

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEES' STATEMENT OPPOSING APPELLATE JURISDICTION.

Pursuant to para. 3 of Rule 12 of the Rules of the United States Supreme Court, appellees file this statement.

Nature of the Case.

This action was brought to recover an income tax paid to the State of Wisconsin, assessed under the provisions of Sec. 6 of Ch. 15, Laws of Wisconsin, 1935. The controversy is in respect to the validity of such taxing statute.

Article VIII, Sec. 1 of the Wisconsin Constitution, so far as material, provides:

"* * * Taxes may also be imposed on incomes, * * *"

The Wisconsin Income Tax Law is contained in Ch. 71, Secs. 71.01 to 71.26, Wisconsin Statutes, 1933. Under the provisions of Sec. 71.04 (4) Statutes of Wisconsin, dividends received from a Wisconsin corporation are deductible from the income upon which the State normal income tax is computed.

Sec. 6 of Ch. 15, Laws of Wisconsin, 1935, entitled "Emergency Relief Tax on Certain 1933 Dividends" was enacted March 27, 1935. The material portions thereof are as follows:

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent. * * *"

The facts in the instant case are not in dispute. It appears from the complaint that during the year 1933 the plaintiff Earle S. Welch was a resident of the State of Wisconsin and received a total income during that year of $13,383.26, of which $12,133.60 was in dividends from Wisconsin corporations; that under the Wisconsin income tax law then in effect, Ch. 71, Stats. 1933, the plaintiff was entitled to deduct from his gross income the full amount of such dividends; that in addition the plaintiff was entitled to deductions from his gross income for 1933 amounting to $11,161.97, plus donations of $100.00, making a total of said deductions of $11,161.97; that plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above, to the State of Wisconsin; that as a result thereof the plaintiff had no net income for the year 1933 subject to Wisconsin normal income tax; that Sec. 6 of Ch. 15, Laws of Wisconsin, 1935, enacted March 27, 1935, by its terms imposed an emergency relief income tax upon the net dividend income of all persons in 1933 which was deductible under Sec. 71.04 (4) Stats. of Wisconsin as received from Wisconsin corporations; that shortly prior to May 15, 1935, the plaintiff received from the Wisconsin Tax Commission a bill for such emergency relief income tax assessed under the provisions of Sec. 6, Ch. 15, Laws of Wisconsin, 1935, which the plaintiff thereupon paid in the amount of $545.71, under protest.

On July 23, 1935, the plaintiff commenced this action against the State Treasurer of the State of Wisconsin to recover such tax so paid under protest, contending that Sec. 6 of Ch. 15 of the Laws of Wisconsin of 1935 is contrary to the provisions of Sec. 1, Art. VIII and Sec. 13, Art. I

of the Wisconsin Constitution and Sec. 1 of the 14th Amendment to the Constitution of the United States. A general demurrer to the complaint was overruled. The Supreme Court of Wisconsin by a decision on January 12, 1937, reported in 223 Wis. 319, 271 N. W. 68, reversed the order overruling the demurrer and remanded the cause with directions to sustain the demurrer. The trial court thereupon sustained the demurrer with leave to the plaintiff to amend the complaint. Within the prescribed time the plaintiff duly amended the complaint and a general demurrer was interposed thereto, which demurrer was sustained. The plaintiff elected to file no further complaint and thereupon the trial court dismissed the complaint. Upon appeal therefrom the Supreme Court of Wisconsin, by a decision January 15, 1938, based upon its former decision, affirmed the judgment dismissing the action. Appeal is now taken to this Court therefrom.

No Substantial Federal Question is Presented.

The appellant claims as a basis for appellate jurisdiction, that Sec. 6 of Ch. 15 of the Laws of Wisconsin of 1935 in imposing an emergency relief income tax upon the dividends received by him from Wisconsin corporations in 1933 is violative of Sec. 1 of the 14th Amendment to the Constitution.

It is appellees' position that on the record herein no substantial Federal question is presented.

I.

The Matter Presented is One of Purely Local Concern.

The Wisconsin Constitution authorizes the imposition of a tax on income. Pursuant to said constitutional authority, the Wisconsin Legislature has enacted a law imposing a tax on income. By the terms of said law "income" includes

dividends received in 1933 from Wisconsin corporations, which dividends are not included in the net income of 1933 which was subject to the State normal income tax. The Wisconsin Supreme Court has sustained this law as a valid tax measure and determined that it is not contrary to the provisions of the Wisconsin Constitution.

In the very nature of the case, the matter is one of purely local concern, and the decision of the State Supreme Court thereon should be regarded as conclusive.

The review of a matter of purely local concern is not within the cognizance of the United States Supreme Court.

Manhattan L. Ins. Co. v. *Cohen*, 234 U. S. 123, 136.

The decision of the State court of last resort on a question of local law is not reviewable in the United States Supreme Court.

Ross v. *Oregon*, 227 U. S. 150, 164.

This Court will always respect the decision of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

Rowan v. *Runnels*, 5 How. 134, 139.

It is well settled that decisions of the State courts based on local laws not involving constitutional questions are not reviewable in the Supreme Court of the United States.

American Ry. Express Co. v. *Commonwealth of Ky.* (1927), 273 U. S. 269, 47 Sup. Ct. 353, 71 L. Ed. 639.

The construction of a State statute by the highest court of the State must be accepted by the Supreme Court of the United States in testing the validity of the statute under the Constitution of the United States.

Quong Ham Wah Co. v. *Ind. Accid. Comisn. of Calif.* (1921), 255 U. S. 445, 41 Sup. Ct. 373, 65 L. Ed. 723;

Tampa Waterworks Co. v. *Tampa* (1905), 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170.

Thus the United States Supreme Court will follow the construction placed upon a State statute by the highest court of the State in order to determine whether a Federal right is involved.

McElvaine v. *Brush* (1891), 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971;

Mackay Tel. & Cable Co. v. *Little Rock* (1919), 250 U. S. 94, 39 Sup. Ct. 428, 63 L. Ed. 863.

Within the general rule that where although a Federal question is raised in the case, if there is also an independent question, not Federal in character, decided by the State court which in itself is broad enough to sustain the judgment the decision is not reviewable by the United States Supreme Court, a State judgment has adequate non-Federal support where it is grounded on the construction, application, or effect of the State statutory law irrespective of the Federal aspects of the case.

Mo. K. & T. R. Co. v. *West*, 232 U. S. 682, 34 Sup. Ct. 471, 58 L. Ed. 795;

Yazoo M. V. R. Co. v. *Brewer*, 231 U. S. 245, 34 Sup. Ct. 90, 58 L. Ed. 204.

The States are left a wide range of legislative discretion notwithstanding the 14th Amendment to the United States Constitution and the conclusions of the State courts respecting the wisdom of their legislative acts are not reviewable by the United States Supreme Court.

Arizona Employers' Liability Cases (1919), 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058.

Though the validity of a law is formally drawn in question in a suit in the State courts the Supreme Court of

the United States should decline jurisdiction and dismiss the appeal whenever it appears that the constitutional question presented is not substantial in character.

Zucht v. *King* (1932), 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194.

II.

No Federal Privilege or Immunity is Denied by the State Decision.

The contention of the appellant is that the State statute in question is contrary to Sec. 1 of the 14th Amendment to the United States Constitution because it denies him equal protection of the laws. This position is based upon the fact that under the Wisconsin Income Tax Law the dividends received in 1933 from Wisconsin corporations were eliminated from the computation of net income upon which the State normal income tax was imposed. Such privilege of deducting said dividends from his income and the immunity thereof from taxation under the normal income tax law arises solely by virtue of the express provisions of the Wisconsin income tax law, Ch. 71, Wis. Stats. 1933. Were it not for the provisions of Sec. 71.04 (4) thereof such dividends from Wisconsin corporations received in 1933 would be included in the net income which was subject to tax. Thus the privilege or immunity which the appellant had by reason thereof exists wholly and solely under the State laws. It is, therefore, not a Federal privilege or immunity but purely one arising under a local law.

A Federal privilege or immunity is not denied by the State decision where, if there was a privilege or immunity, it existed wholly under State laws or the State constitution.

New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

III.

Appellant's Claim that Rights Under the Federal Constitution have been Violated, is Without Merit for the Reason that He is Dealt with Under the State Statute in the Identical Way all Other Taxpayers Similarly Situated are Treated.

The taxpayer in question as the recipient of dividends in 1933 from Wisconsin corporations is dealt with under Sec. 6 of Ch. 15 of the Laws of Wisconsin, 1935, in the same manner as all other taxpayers in the State who received dividends from Wisconsin corporations in 1933. All taxpayers who received such dividends in 1933 are treated alike and in identical manner under this State law. A tax is imposed upon each of them in the same manner. No one taxpayer is singled out and treated differently from any other taxpayer. Each of such taxpayer's rights were dealt with in an identical manner under the Wisconsin income tax law, Ch. 71, in the imposition of the Wisconsin normal income tax. That is, each of them was entitled to deduct such dividends received in 1933 from the computation of their net income, which was subject to normal income tax in that year. So, under the Wisconsin income tax law the appellant was not dealt with in any manner different from that of any other taxpayer similarly situated. He was granted the same immunity and privilege that all other taxpayers in the same position were granted. All taxpayers similarly situated were under that law treated alike and in identical manner.

Thus it seems clear that there can be no contention of inequality because all have been treated alike. Each taxpayer in the same situation received the same treatment and received the same privileges and immunities. So also the imposition of the tax in question fell upon all alike.

There is thus no denial of equal protection of the laws. Manifestly, this claim of the appellant of denial of equal protection of the laws is erroneous.

A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a State court.

Parker v. *McLain*, 237 U. S. 469, 473-474.

The United States Supreme Court is without jurisdiction to review the decision of a State court where there is no substance in the Federal question upon which the jurisdiction depends.

Great Northern R. Co. v. *Alexander*, 246 U. S. 276, 282.

On error from a State court to the United States Supreme Court, where the Federal question asserted to be contended in the record is manifestly lacking all color of merit, the writ of error should be dismissed.

Swafford v. *Templeton*, 185 U. S. 487, 493-494.

Fair color for claiming any rights under the Federal constitution have been violated is necessary to give jurisdiction to the United States Supreme Court on writ of error to a State court based on such federal question.

Wilson v. *No. Car. ex rel. Caldwell*, 169 U. S. 586, 595-596.

IV.

There is No Denial of Due Process as Adequate Legal Proceedings are Provided in the Statute.

There is no denial of due process of law in the tax imposed because Subdivision 5 of Para. (c) of Subsec. (1) of Sec. 6, Ch. 15, Laws of Wisconsin for 1935 expressly

provides for the recovery of the tax in question if paid under protest in the event that the tax is illegally imposed. This is the procedure which the appellant avails himself of in this case and under which the action was started. The tax in itself is no denial of due process of law. The Wisconsin normal income tax is imposed in the same manner and a taxpayer desiring to assert nonliability for such tax must, like the appellant here, pay his tax and bring suit for a refund. The procedure is very similar.

V.

The Decision of the State Court was so Plainly Right as not to Require Argument.

The decision of the State court that the statute in question does not violate the Wisconsin constitution is so plainly right as to not require further argument. Such decision shows that the appellant and all persons similarly situated are treated with equality and fairness under this taxing statute. There is no discrimination and no injustice demonstrated. The legislature has imposed a tax within its power under the State constitution. There is no inequality and no denial of due process. Upon the same reasoning which shows that the statute does not violate the Wisconsin constitution, it does not violate the United States constitutional provisions as claimed by the appellant. The same considerations are involved in both problems.

If it appears that the decision of a Federal question was so plainly right as not to require argument the writ should not be allowed.

Ex parte Spies, 123 U. S. 131, 164.

Respectfully submitted,

ORLAND S. LOOMIS,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin;
JOSEPH E. MESSERSCHMIDT,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 888

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN, STATE TREASURER OF THE STATE OF WISCONSIN,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin, appellees herein, by Orland S. Loomis, Attorney General of the State of Wisconsin, Harold H. Persons, Assistant Attorney General of the State of Wisconsin, and Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin, their counsel, and move this Court to dismiss with costs the appeal taken herein to this Court by Earle S. Welch, upon the following grounds:

1. The matter presented is one of purely local concern.

2. No Federal privilege or immunity is denied by the State decision.

3. Appellant's claim that rights under the Federal Constitution have been violated, is without merit for the reason that he is dealt with under the State statutes in the identical way as all other taxpayers similarly situated are treated.

4. There is no denial of due process as adequate legal proceedings are provided in the statute.

5. The decision of the State court was so plainly right as not to require argument.

6. No substantial Federal question is involved.

In the alternative, appellees move this Court to affirm on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated this 2nd day of March, 1938.

ORLAND S. LOOMIS,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin;
JOSEPH E. MESSERSCHMIDT,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1938

No. 13

EARLE S. WELCH,

Appellant.

v.

ROBERT K. HENRY and SOLOMN LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPELLEES' BRIEF

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MAYER PRINTING CO., MADISON, WIS.

INDEX

SUBJECT INDEX

		Page
I.	THE OPINION OF THE COURT BELOW	1
II.	STATEMENT OF THE CASE	2
III.	STATUTES INVOLVED	4
IV.	SUMMARY OF ARGUMENT	6
	A. The tax involved herein is an income tax and as such is validly imposed at graduated rates	6
	B. The imposition of the tax in question is based upon a reasonable classification	6
	C. The tax involved herein is not a substitute tax	6
	D. The tax in question is not invalid because retroactive	6
V.	ARGUMENT	
	A. THE TAX INVOLVED HEREIN IS AN INCOME TAX AND AS SUCH IS VALIDLY IMPOSED AT GRADUATED RATES	6

Page

B. THE IMPOSITION OF THE TAX IN QUESTION IS BASED UPON A REASONABLE CLASSIFICATION 17

C. THE TAX INVOLVED HEREIN IS NOT A SUBSTITUTE TAX 21

D. THE TAX IN QUESTION IS NOT INVALID BECAUSE RETROACTIVE 23

CONCLUSION 36

TABLE OF CASES CITED

Adams Manufacturing Co. v. Storen, (1938) — U. S. —, 58 S. Ct. 913 16

Billings v. U. S., (1914) 232 U. S. 261 24

Blair v. Oesterlein Mach. Co., (1927) 275 U. S. 220 ..... 25, 28

Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1 ..... 7, 13, 24

Burnett v. Wells, (1933) 289 U. S. 670 24

Carbon Steel Co. v. Lewellyn, (1920) 251 U. S. 501 25

Citizens' Telephone Co. v. Fuller, (1913) 229 U. S. 322 17

Cliffs Chemical Co. v. Wis. Tax Comm., (1927) 193 Wis. 295 26

Colgate v. Harvey, (1935) 296 U. S. 404 ..... 13, 17

PAGE

Cooper v. U. S., (1930) 280 U. S. 409 ..... 23, 24

Cope's Estate, In re, (1899) 191 Pa. 1 16

Davis v. U. S., (C.C.A. 2, 1937) 87 Fed. (2d) 323 8

Dawson v. Kentucky Distilleries, etc., (1921) 255 U. S. 288 16

Deaman v. Slayton, (1931) 282 U. S. 514 13

Eisner v. Macomber, (1920) 252 U. S. 189 8

Federal Land Bank v. Crosland, (1923) 261 U. S. 374 ... 16

Flint v. Stone Tracy Co., (1911) 220 U. S. 107 ..... 24, 25

Greenport Basin & Construction Co. v. U. S., (1923) 260 U. S. 512 25

Hale v. State Board of Assessment and Review, (1937) 302 U. S. 95 16

Hecht v. Malley, (1924) 265 U. S. 144 ..... 24, 25

Helvering v. Independent L. Ins. Co., (1934) 292 U. S. 371 ..... 12, 13

Henneford v. Silas Mason Co. (1937) 300 U. S. 577 12

R Hoe & Co., Inc. v. Commr. of Int. Rev., (C.C.A. 2nd, 1929) 30 Fed. (2d) 630 14

Income Tax Cases, (1912) 148 Wis. 456 ..... 7, 13, 26

Koshland v. Helvering, (1936) 298 U. S. 441 8

PAGE

LaBelle Iron Works v. U. S., (1921) 256 U. S. 377 25

Louisville Gas & Electric Co. v. Coleman, (1928) 277 U. S. 32 17

Louisville Provision Co. v. Glenn, (D.C. Ky. 1937) 18 Fed. Sup. 423 ..... 14, 28

Lynch v. Hornby, (1918) 247 U. S. 339 ..... 8, 24

Lynch v. Turrish, (1918) 247 U. S. 221 8

Macallen Co. v. Massachusetts, (1929) 279 U. S. 620 16

National Life Ins. Co. v. United States, (1928) 277 U. S. 508 16

National Paper & Type Co. v. Edwards, (D.C. N. Y.), (1923) 292 Fed. 633 25

New Colonial Ice Co. v. Helvering, (1934) 292 U. S. 435 12

New York ex rel. Cohn v. Graves, (1937) 300 U. S. 308 ..... 7, 13

Nichols v. Coolidge, (1927) 274 U. S. 531 25

Northwestern Mutual Life Ins. Co. v. Wis., (1927) 275 U. S. 136 16

O'Gorman & Young v. Hartford F. Ins. Co., (1931) 282 U. S. 251 31

PAGE

Peabody v. Eisner, (1918) 247 U. S. 347 8

Porto Rico Coal Co., Inc. v. Edwards, (D.C.N.Y.), (1921) 275 Fed. 104 25

Railroad Co. v. Rose, (1877) 95 U. S. 78 23

Railroad Co. v. U. S., (1880) 101 U.S. 543, 549 24

Schuster v. Henry, (1936) 218 Wis. 506 16

Senior v. Braden, (1935) 295 U. S. 422 16

Schaffer v. Carter, (1920) 252 U. S. 37 14

State Board of Tax Commrs. of Indiana v. Jackson, (1931) 283 U. S. 527 17-18

State ex rel. Botkin v. Welsh, (1933) 61 S. Dak. 593 16

State ex rel. Globe Steel Tubes Co. v. Lyons, (1924) 183 Wis. 107 ..... 26, 27

Stewart Dry Goods Co. v. Lewis, (1935) 294 U. S. 550 16

Stockdale v. The Atlantic Ins. Co., (1874) 20 Wall. 323 ..... 23, 24, 28, 29

Thompson v. McLeod, (1916) 112 Miss. 383 16

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60 ..... 13, 14

U. S. Glue Co. v. Oak Creek, (1918) 247 U. S. 321 10

Page

United States v. Anderson, (1926) 269 U. S. 422 25

U. S. v. Hudson, (1937) 299 U. S. 498 ..... 11, 14, 15, 23, 24, 26

United States v. Robbins, (1926) 269 U. S. 315 ..... 24, 28

Van Dyke v. Tax Comm., (1935) 217 Wis. 528 ..... 26, 27

Welch v. Henry, 226 Wis. 595 ..... 1, 20-21, 29, 34

West v. Tax Comm., (1932) 207 Wis. 55 ..... 26, 27, 28

Willcuts v. Bunn, (1931) 282 U. S. 216 16

Willcuts v. Milton Dairy Co., (1927) 275 U. S. 215 ..... 25, 28

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

U. S. Const.

14th Amendment 4, 17, 21

Sec. 1 36

Joint Resolution 1864

No. 77 24

Statutes at Large

13 Stats. 417 24

36 11 25

38 114 24

PAGE

756 25

1000 25

300 25

1057 25

1507 24

Wis. Const.
Art. VIII, sec. 1 ..... 6, 13

Laws of Wisconsin, 1935
Chapter 15 ..... 3, 4, 29, 31, 32, 34, 35

Sec. 2 ..... 22, 31, 32, 33

Subsec. (2) (a) 32

Sec. 6 ..... 2, 3, 4-5, 7, 15, 18, 22, 29, 32, 33, 34, 35, 36

Laws Special Session 1931-32
Sec. 4, Ch. 29 22

Wis. Stats. 1933
Sec. 71.04, Ch. 71 2

Subsec. (4) 3, 5-6, 7, 18, 32

71.06, Ch. 71 5

71.09 (4) (a) 33

Supreme Court of the United States

OCTOBER TERM, 1938

No. 13

EARLE S. WELCH,

Appellant.

v.

ROBERT K. HENRY and SOLOMN LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

APPELLEES' BRIEF

I

THE OPINION OF THE COURT BELOW

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, dated January 14, 1938. The opinion delivered in support thereof, is reported under the title, *Welch v. Henry*, in 226 Wisconsin 595. It is based upon and affirms a prior decision of that court in the same case reported in 223 Wisconsin 319, upon a previous appeal from an order overruling a demurrer to the original complaint, where the questions here involved were originally considered.

II

STATEMENT OF THE CASE

This is an appeal in an action commenced against the Treasurer of the State of Wisconsin to recover $545.71 Emergency Relief Taxes levied by the State of Wisconsin pursuant to section 6 of Chapter 15, Laws of Wisconsin of 1935, paid under protest by the appellant. The facts involved herein are not in dispute and only questions of law are presented on this appeal.

Earle S. Welch, the appellant, a resident of the State of Wisconsin and engaged in the insurance business, received a gross income of $13,383.26 during the year 1933, consisting of: Commissions $608.74, rents $60.00, interest $558.42, and dividends $12,156.10. Of said dividends $4,153.60 thereof were received from the Eau Claire Press Company, Eau Claire, Wisconsin, a Wisconsin corporation, and $7,980.00 thereof were received from the National Pressure Cooker Company, Eau Claire, Wisconsin, a Wisconsin corporation. In said year 1933, appellant paid taxes of $72.68, paid interest in the sum of $1,420.25, expended $1,050.20 in ordinary and necessary business expenses, and sustained a net loss of $8,518.84 from the sale of securities, totaling $11,061.97. During the years he made donations, deductible for Wisconsin normal income tax purposes, in the sum of $100.00.

Under section 71.04 of Chapter 71, Wisconsin Statutes 1933, the above mentioned taxes, interest, business expenses, donations and loss on the sale of securities were all deductible from gross income in arriving at the 1933 net income taxable thereunder for normal tax purposes. Also dividends received by a resident of Wisconsin from all corporations attributing 50 per cent or more of their

entire net income to Wisconsin for income tax purposes and subject to Wisconsin income tax, were deductible under subsection (4) of said section 71.04 Wisconsin Statutes in determining the taxpayer's net income. By reason of these deductions the appellant paid no normal income tax to the State of Wisconsin on 1933 income.

Chapter 15 of the Laws of Wisconsin for 1935, was passed by the Wisconsin Legislature on March 6, 1935, approved by the Governor of Wisconsin on March 14, 1935, and published March 27, 1935. Section 6 thereof, entitled "Emergency Relief Tax on Certain 1933 Dividends" expressly provided for the levy and assessment of an emergency tax at graduated rates, payable on or before May 15, 1935, upon the "net dividend income" of all persons in the year 1933. "Net dividend income" taxable thereunder was defined as all dividends received in 1933 and deducted under subsection (4) of section 71.04 Wisconsin Statutes 1933, less $750.00.

Prior to May 15, 1935, pursuant to said section 6, Chapter 15 Laws of Wisconsin of 1935, there was assessed and levied by the State of Wisconsin, against the appellant an emergency relief tax of $556.84 computed upon the dividends from the Wisconsin corporations totaling $12,133.60 received by him in 1933 and deducted in that year under the provisions of subsection (4) of section 71.04 Wisconsin Statutes 1933 for Wisconsin normal income tax purposes. This tax, less 2 per cent discount for prompt payment, was paid under protest on May 15, 1935. Subsequently the appellant taxpayer commenced action in the Circuit Court for Eau Claire County, State of Wisconsin as provided in said section 6 of Chapter 15, Laws of Wisconsin of 1935 for recovery of the tax so paid. He alleged that the tax so exacted was invalid because contrary to the provisions of the Wisconsin Constitution and vio-

lative of the due process clause and the equal protection provisions of the 14th Amendment to the United States Constitution. Upon appeal to the Supreme Court of Wisconsin said tax was held constitutional. It is from this decision that the appeal here is taken.

III

STATUTES INVOLVED

Chapter 15 of the Laws of Wisconsin for 1935 is entitled "An Act to Raise Revenues for Emergency Relief Purposes, and Making Appropriations." The material portions of section 6 thereof, here involved, are as follows:

"Section 6. Emergency Relief Tax on Certain 1933 Dividends.

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent.

"* * *"

The normal income tax law of Wisconsin is Chapter 71 of the Wisconsin Statutes for 1933. The rates thereof appear in section 71.06 of said Chapter 71. The provisions for the deduction of dividends from certain corporations are contained in section 71.04 (4) of said Chapter 71, and read as follows:

"71.04 DEDUCTIONS FROM INCOMES OF PERSONS OTHER THAN CORPORATIONS. Persons other than corporations, in reporting incomes for purposes of taxation, shall be allowed the following deductions:

"(1) * * *

"(2) * * *

"(3) * * *

"(4) Dividends, except those provided in section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this state. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax

purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71, * * *"

IV

SUMMARY OF ARGUMENT

A. The tax involved herein is an income tax and as such is validly imposed at graduated rates.

B. The imposition of the tax in question is based upon a reasonable classification.

C. The tax involved herein is not a substitute tax.

D. The tax in question is not invalid because retroactive.

V

ARGUMENT

A. THE TAX INVOLVED HEREIN IS AN INCOME TAX AND AS SUCH IS VALIDLY IMPOSED AT GRADUATED RATES.

Section 1 of Article VIII, Wisconsin Constitution, as amended in 1908, provides:

> "Section 1. * * * Taxes may also be imposed on incomes, priveleges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

It is not to be doubted that under the above constitutional provision the State of Wisconsin has the power to impose a tax upon income at graduated rates and provide for reasonable exemptions.

Income Tax Cases, (1912) 148 Wis. 456 (writ of error dismissed 231 U. S. 616);
New York ex rel Cohn v. Graves, (1937) 300 U. S. 308;
Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1.

The appellant does not contend that the tax here involved is invalid as an income tax because it is imposed at graduated rates. His contention is that the tax is not an income tax but is a property tax which may not be imposed at graduated rates. Thus his argument in reference to invalidity because the tax is imposed at graduated rates is applicable only if the tax is a property tax.

On its face section 6 of Chapter 15, Laws of Wisconsin of 1935, clearly imposes an income tax levied purely for revenue purposes. It expressly says that the tax is laid upon the "net dividend income" received in the year 1933. The income thereby taxed is that which is received as dividends. "Dividends" are expressly defined as meaning "all dividends derived from stocks," whether paid in cash or property, received in the year 1933 and which were deductible under subsection (4) of section 71.04 Wisconsin Statutes of 1933 for Wisconsin normal income tax purposes. The net income by which the tax is measured is the total received from that type of dividends after deducting therefrom a flat sum of Seven Hundred Fifty Dollars. The tax is not imposed upon the gross amount received from such dividends but is specifically laid upon the net income from that source. It is thus a special income tax measured by the income from a particular type of receipts.

Income is the gain or profit which is received. It has been defined as the

"* * * 'gain derived from capital, from labor, or both combined,' * * *"

"* * * a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the

capital however invested or employed, and *coming* in, being 'derived,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. * * *"

Eisner v. Macomber, (1920) 252 U. S. 189, 207.

Dividends from coporate stocks received in cash or property, except liquidating dividends and certain dividends by a corporation in its own stock, represent, in the hands of the person receiving the same, a gain derived from capital invested and are not a return of the capital itself.

Lynch v. Turrish, (1918) 247 U. S. 221;
Lynch v. Hornby, (1918) 247 U. S. 339;
Peabody v. Eisner, (1918) 247 U. S. 347;
Eisner v. Macomber, (1920) 252 U. S. 189;
Koshland v. Helvering, (1936) 298 U. S. 441.

Thus, a tax measured by dividends received is measured by the amount of gain received by the recipient from capital invested. It is therefore a tax upon the income which came to the recipient from that source and is not upon the property itself. Such tax has all the elements of and is an income tax.

In determining income for the purposes of imposing an income tax thereon there is no constitutional necessity for any deduction from the gross amount received. The only requirement is that such deduction be made as will arrive at what is in fact income. Such deductions are composed of only those items which are expenses involved in the production of the income or necessary to effect a restoration of capital.

Davis v. U. S., (C.C.A. 2, 1937) 87 Fed. (2d) 323, (certiorari denied by this court June 1, 1937, 301 U. S. 704, rehearing denied October 11, 1937, 302 U. S. 773).

In that case the above principle which underlies all taxation of income as such was clearly recognized where it was said at page 324 of the opinion:

> "It will be well to note at the start that our scheme of income taxation provides for a method of computation whereby all receipts during the taxable period which are defined as gross income are gathered together and from the total are taken certain necessary items like cost of property sold; ordinary and necessary expenses incurred in getting the so-called gross income; depreciation, depletion, and the like in order to reduce the amount computed as gross income to what is in fact income under the rule of Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570, and so lawfully taxable as such. In this way true income is ascertained by taking from gross income as defined that which is necessary as a matter of actual fact in order to determine what as a matter of law may be taxed as income. While such subtractions are called deductions, as indeed they are, they are not to be confused with deductions of another sort like personal exemptions; deductions for taxes paid; losses sustained in unrelated transactions and other like privileges which Congress has seen fit to accord to income taxpayers under classifications it has established. While the first kind of deductions are inherently necessary as a matter of computation to arrive at income, the second may be allowed or not in the sound discretion of Congress; the only restriction being that it does not act arbitrarily so as to set up in effect a classification for taxation so unreasonable as to be a violation of the Fifth Amendment. * * *"

Where a tax is measured by so much of the amount received as is in excess of any deductions necessary to arrive at true income such tax is one measured by the income received and so is an income tax. That part of the amount received which does not represent the return of capital is the income received. That is, in order for a tax to be a valid income tax it must be imposed on that which is

income, but in determining what is income it is only necessary that there be subtracted from the total received such deductions as have a direct bearing upon the cost of producing that which is received and relates to the source from which derived. Where no part of the amount received represents the cost of producing it there is no necessity for any deductions therefrom and the entire amount received constitutes income in the hands of the person receiving the same. In such instance the fact that the amount received from a particular source and the income therefrom co-incide in amount does not in any manner prevent the whole of the amount from being income. They are then both one and the same amount. It follows then that a tax measured by the amount received where there is no necessity for any deduction is a tax measured by and laid upon income and is an income tax.

The distinction between a tax measured by gross receipts and one measured by net income is shown by this Court in *U. S. Glue Co. v. Oak Creek*, (1918) 247 U. S. 321, at page 328, 329, where it was said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. * * *"

By their very nature, dividends on corporate stock, other than liquidating dividends and certain dividends in stock of the corporation, are income to the recipient. Such dividends represent a residue remaining after all costs of production or expenses relating thereto have been deducted by the corporation prior to the declaration and payment of such dividends. When a person owning stock receives such dividends they are in fact net gain from capital invested and as such constitute income in his hands. Therefore a tax measured by the amount of corporate dividends received is a tax upon income received and is an income tax and not a property tax.

In the case of *U. S. v. Hudson*, (1937) 299 U. S. 498, this Court said at page 500:

> "The taxing provision does not impose a tax in respect of all transfers, but only in respect of such as yield a profit over cost and allowed expenses. If there be no profit there is to be no tax. If there be a profit the tax is to be 50% of it. Thus a profit is made the occasion for the tax and also the measure of it. Because of this, counsel for the Government contend that the tax is a special income tax; and we think the contention is sound."

Whether or not the statute imposing the tax here under consideration provides for a deduction of interest paid or losses sustained in unrelated transactions, or even those involved in a dealing in the corporate stock upon which the dividends taxed were received, presents no constitutional question as to the validity of the tax. Losses sustained upon the sale of assets would have to be taken into consideration only upon a determination of whether the taxpayer received any gain upon disposal of the assets themselves. Similarly interest paid would only enter into the situation where the taxpayer's income from all sources

was being considered and it was shown to have some direct bearing upon the production of the income taxed.

The record here does not show that the losses sustained or the interest paid by the appellant in 1933 were related in any manner to the dividends received by him in that year. Nor does he make any claim that he had any expenses during that year which related to said dividends or the production thereof. Even if the non-allowance of a deduction for such losses sustained and interest paid did present a question as to the constitutionality of this taxing statute, the appellant is not in a position here to even raise that question. He may not be heard to complain in reference to a situation which as to him does not exist. He is not the champion of any rights except his own.

Henneford v. Silas Mason Co., (1937) 300 U. S. 577, 583.

In determining taxable income for the purposes of imposing an income tax thereon the legislature usually allows deduction to be made for taxes, losses or unrelated transactions and personal exemptions. Deductions of this type may be allowed, limited or wholly denied in the discretion of the legislative body as they are purely a matter of legislative grace and not a matter of right.

New Colonial Ice Co. v. Helvering, (1934) 292 U. S. 435;
Helvering v. Independent L. Ins. Co., (1934) 292 U. S. 371.

Accordingly the appellant cannot question the validity of the allowance of the deduction of a flat amount of Seven Hundred Fifty Dollars from the dividends received in arriving at the income upon which the tax is imposed. Nor may he predicate any argument founded upon the effect thereof. Such deduction is within the

class of discretionary allowances which are a matter of legislative grace.

The contention of the appellant that the tax in question is invalid because of the imposition of the tax at graduated rates and the allowance of a flat deduction is applicable only if the tax were in fact a property tax. It is however an income tax which the State of Wisconsin has the power to impose. Art. VIII, Sec. 1 of the Wisconsin Constitution expressly authorizes the imposition of an income tax at graduated rates and with the allowance of exemptions. Income taxes imposed at graduated rates and providing for reasonable exemptions have been consistently sustained upon the theory that such taxes are laid upon the individual in proportion to his ability to pay, such ability being measured by his income.

Income Tax Cases, (1912) 148 Wis. 456 (writ of error dismissed 231 U. S. 616);
New York ex rel Cohn v. Graves, (1937) 300 U. S. 308.

In order that a tax on income bear a relationship to ability to pay it is not necessary that it be imposed upon all income from all sources and take into consideration all expenses and losses.

Colgate v. Harvey, (1935) 296 U. S. 404;
Helvering v. Independent Life Ins. Co., (1934) 292 U. S. 371;
Denman v. Slayton, (1931) 282 U. S. 514;
Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60;
Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1.

An income tax has been sustained as such even though the deductions allowed were limited to those relating to the income which was taxed.

Travis v. Yale Towne Mfg. Co., (1920) 252 U. S. 60.

A tax measured by the income from a particular locality is nevertheless a valid income tax.

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60;
Schaffer v. Carter, (1920) 252 U. S. 37.

The tax here involved is an income tax because it is imposed upon and measured by income. This is true notwithstanding that the tax is imposed upon and measured by income from a particular source.

U. S. v. Hudson, (1937) 299 U. S. 498;
Louisville Provision Co. v. Glenn, (D. C. Ky. 1937) 18 Fed. Sup. 423;
R. Hoe & Co. Inc., v. Commissioner of Int. Rev., (C. C. A. 2, 1929) 30 Fed. (2d) 630.

The tax involved in the *Hudson* case was measured by the profit which arose solely from the sale of silver bullion. This Court sustained that tax as a special income tax.

Under the scheme of taxation passed upon in the *Hudson* case the tax has an effect which is identical with that of the tax here involved. There the income upon which the tax was imposed and by which it was measured arose from only one class of transactions. Any other operations of the taxpayer were not taken into consideration. The income taxed was the profit or gain realized by the taxpayer from the particular transactions. Deduction from the gross amount received was allowed only for those costs and expenses necessary to the producing of such profit. The resultant income which was taxed represented the gain actually realized from such transactions. The tax was sustained as a special income tax.

The tax here involved, imposed by section 6 of Chapter 15 of Laws of Wisconsin of 1935, is laid upon and measured by the income received solely from dividends previously exempted from taxation for normal income tax purposes. No other transactions of the taxpayer during the period are taken into consideration. The dividend income which is taxed is, by its very nature, the gain received by the taxpayer from the ownership of the stock upon which the dividends were declared and paid. There was no occasion for the allowance of any deduction for costs or expenses relating to the production thereof because payment thereof had already been made by the corporations before distribution of such dividends. Thus the amount of dividends received represented the gain actually realized during 1933 by the taxpayer from the ownership of the stock. Therefore the imposition of the tax measured by the net dividend income, arrived at by subtracting the sum of Seven Hundred and Fifty Dollars from the total dividends received in the year, effects a tax which is laid upon the gain realized from the particular source. It would therefore seem conclusive that the tax here involved is likewise an income tax. The tax passed upon in the *Hudson* case being an income tax it seems inescapable that the tax imposed by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 is also an income tax.

The cases cited by the appellant as authority for his contention that the tax in question is not an income tax do not support that proposition.

Of such cases the following involve the question of the power to tax and hold that income received from the state or federal governments, or an agency thereof, is not subject to tax directly or indirectly by the other government, under the doctrine of intergovernmental immunity:—

Northwestern Mutual Life Ins. Co. v. Wisconsin, (1927) 275 U. S. 136;
National Life Ins. Co. v. United States, (1928) 277 U. S. 508;
Federal Land Bank v. Crosland, (1923) 261 U. S. 374;
Macallen Co. v. Massachusetts, (1929) 279 U. S. 620;
Willcuts v. Bunn, (1931) 282 U. S. 216.

The following cases so cited by appellant are concerned only with the question of whether the imposition of an income tax on certain income impairs the obligation of contract:

Adam Manufacturing Co. v. Storen, (1938) .... U. S. ...., 58 S. Ct. 913;
Hale v. State Board of Assessment and Review, (1937) 302 U. S. 95.

The tax involved in these cases so cited is a tax laid as a property tax:

Senior v. Braden, (1935) 295 U. S. 422;
Dawson v. Kentucky Distilleries etc., (1921) 255 U. S. 288;
Thompson v. McLeod, (1916) 112 Miss. 383;
In re Cope's Estate, (1899) 191 Pa. 1.

The remaining cases cited by appellant to sustain his contention pertain to taxes levied upon gross sales or receipts as such and without any relation to true income. Such cases are:

Stewart Dry Goods Co. v. Lewis, (1935) 294 U. S. 550;
Schuster v. Henry, (1935) 218 Wis. 506;
State ex rel Botkin v. Welsh, (1933) 61 S. Dak. 593.

B. THE IMPOSITION OF THE TAX IN QUESTION IS BASED UPON A REASONABLE CLASSIFICATION.

It is well established that the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation, and that the power to classify for purposes of taxation is of wide range and flexibility. The classification is valid if reasonable and rests upon some ground of difference or distinction having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.

Louisville Gas & Electric Co. v. Coleman, (1928) 277 U. S. 32;
Colgate v. Harvey, (1935) 296 U. S. 404;
Citizens' Telephone Co. v. Fuller, (1913) 229 U. S. 322.

"* * * The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & L. Co. 240 U. S. 342,

60 L. ed. 679, L.R.A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 55 L. ed. 350, 32 S. Ct. 192. As was said in Brown-Forman Co. v. Kentucky, supra, (217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578):

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

State Board of Tax Commissioners of Indiana v. Jackson, (1931) 283 U. S. 527, 537.

The tax imposed by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 is a tax measured by and laid upon the income received in 1933 from corporate dividends which were deducted from taxable income for normal income tax purposes in Wisconsin in 1933 under the provisions of subsection (4) of section 71.04 Statutes of Wisconsin of 1933. It is to be noted that the dividends thus deducted in 1933 were not solely or necessarily those received from stock in Wisconsin corporations as distinguished from dividends from stock in out of state corporations. The allowed deduction extended to dividend income received by Wisconsin residents from *all* corporations whose income was subject to income taxation in Wisconsin in that year.

At the outset the recipients of dividends from corporate stocks stand in an entirely different situation from the recipients of other types of income, because dividends when received come into the hands of the persons receiving them free of expense and are in fact net gain. Other types of income do not necessarily represent the gain or profit received by the recipient. There is thus a very real and distinct difference between dividend income and other types of incomes. The recipients of dividends therefore are in a separate and distinct class from persons receiving income from other sources, which classification for income tax purposes is founded upon a reasonable existing distinction.

Separate classifications of recipients of dividends may also exist where there is substantial difference and distinction between such recipients upon which to found a classification. Persons in Wisconsin who received dividends from corporate stock in 1933, which they were allowed to deduct from taxable income of 1933 for Wisconsin income tax purposes of that year, stand in an entirely different situation from persons in that state who received corporate dividends in that year which were not deductible. They likewise stand apart from other taxpayers who received other types of income which were subject to tax. By reason of the deductibility of the dividends received in 1933 the persons receiving them have paid no income tax to the State of Wisconsin in proportion to their ability to pay as measured by the income thereby received. They have not borne any part of the cost of government of the State of Wisconsin for the protection afforded to them and the benefits derived therefrom in respect to the reception of said dividends and the enjoyment thereof. Those persons who received non-deductible corporate dividends in 1933, as well as persons who received income in 1933 from other sources, paid to the state

their share of the burdens of govenrment. In the hands of one class the dividend income was subjected to tax but in the hands of the other class it was not. There is therefore a substantial distinction between the position of the recipients of deductible corporate dividends and that of persons who received nondeductible corporate dividends. Likewise the same distinction exists between the class of persons who received deductible dividends and other taxpayers generally whose income was subjected to tax.

Whatever may have been the motive for the allowance of the deduction in the first instance which had the effect of relieving the deductible dividends from taxation, is not material. The fact exists that persons who received deductible dividends in 1933 occupy a very different position from that of persons whose dividend income was not deductible. If there was a reasonable basis for the classification upon which to base the deduction of certain dividends in 1933, that classification still exists and is a sufficient basis for the imposition of a tax upon the class. The Supreme Court of Wisconsin in its decision, 223 Wisconsin 319, upon this point said at page 324:

> "* * * It does not impress us as material upon the issue of discrimination whether the previous exemption was accomplished by taxing all income except that derived from dividends of Wisconsin corporations or by taxing all income and allowing the deduction of income from this source. These are mere matters of form. The net result was that this income had not been subjected to a normal tax. In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income. The reason for imposing a special burden is as valid as that for exempting it from the normal burden. * * * Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against, when the whole pat-

tern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted."

It is a reasonable classification because based upon substantial distinctions. What could be more reasonable than that in imposing an income tax it be laid upon that which has not been subjected to tax.

The Legislature of Wisconsin unquestionably realized that the recipients of deductible dividend income of 1933 bore an entirely different relationship to the tax burden than did persons who received nondeductible dividend income in that year, as well as other persons who received taxable income from sources in 1933, and made that the basis upon which it predicated the imposition of the special income tax thereon. Such classification is based upon real and substantial distinctions which bear a reasoable and direct relationship to ability to pay.

C. THE TAX INVOLVED HEREIN IS NOT A SUBSTITUTE TAX.

The contention of the appellant that the tax in question is arbitrary and discriminatory because the amount of tax thereby levied upon him is in excess of the amount of normal income tax which he would have paid if the dividends received by him in 1933 had not been deducted from taxable income of 1933 for normal income tax pur-

poses and therefore violates the Fourteenth Amendment, is without merit. Such argument presupposes that this tax is a substitute tax, which it is not. It replaces no other tax. Rather, it is a new and special tax for emergency relief purposes. Its avowed purpose is entirely different from that of normal income taxes which are levied to meet the ordinary costs of government.

Any attempt to compare the amount of tax falling upon a taxpayer by reason of the imposition of the tax by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 with the tax he would have paid if the income by which the 1935 tax is measured had been included in 1933 taxable income for normal tax purposes of that year, indulges in sheer speculation. No one is able to say what tax would have been payable in 1933 had such income been included in taxable income. If the Legislature had seen fit to so include it very possibly such income might have been treated in some special manner. It is impossible to know what deductions, if any, might have been allowed against said income. The manner in which the Legislature might have dealt with losses sustained and what deductions, if any, would have been then allowed therefor is in the realm of the speculative.

The Emergency Income Tax on 1931 incomes imposed by section 4 of Chapter 29 of Laws of Wisconsin, Special Session of 1931-1932, adequately illustrates this point. There, for the purposes of that tax, dividends from corporations subject to Wisconsin tax in 1931 were included in taxable income of 1931 by express provision. However losses on the sale or disposition of stocks, bonds and other securities were not deductible in arriving at taxable income unless such assets constituted the regular stock in trade of the taxpayer or were held by him in

the course of his regular trade or business. The legislature there handled the deduction for losses sustained in a special manner. Section 2 of Chapter 15, Laws of Wisconsin of 1935 as discussed herein later under point D also is illustrative.

The Legislature of Wisconsin in imposing taxes for emergency relief purposes in 1935 undoubtedly had in mind the imposition of said tax in as equitable a manner as possible. As no income received in the year 1933 had been subjected to any emergency tax for relief purposes, the income received in that year, from deducted dividends had not been made the subject of any income tax in the hands of the recipients. In furtherance of the desire to impose the emergency relief burden equitably so far as possible it imposed this new and special emergency tax on income, which included the dividend income which had not borne any of the tax burden.

D. THE TAX IN QUESTION IS NOT INVALID BECAUSE RETROATIVE.

The appellant concedes that the retroactivity of an income tax, in and of itself, presents no constitutional question and does not render the tax invalid (Brief 27). It has long been established and is now well recognized that an income tax law may operate retroactively and impose a tax upon income received prior to its enactment.

U. S. v. Hudson, (1937) 299 U. S. 498;
Cooper v. U. S. (1930) 280 U. S. 409;

For more than a half century it has been settled that a law of Congress imposing a tax may be retrospective in operation.

Stockdale v. The Atlantic Ins. Co., (1874) 20 Wall. 323, 331;
Railroad Co. v. Rose, (1877) 95 U. S. 78, 80;
Railroad Co. v. U. S., (1880) 101 U.S. 543, 549;
Flint v. Stone Tracy Co., (1911) 220 U.S. 107;
Billings v. U. S., (1914) 232 U. S. 261, 262;
Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1,20;
Lynch v. Hornby, (1918) 247 U. S. 339, 343;
Hecht v. Malley, (1924) 265 U. S. 144, 164;
Burnet v. Wells, (1933) 289 U. S. 670;
U. S. v. Hudson, (1937) 299 U. S. 498;
Cooper v. U. S., (1930) 280 U. S. 409.

Each of the federal income tax acts adopted from time to time during the last seventy-three years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year. The Act of October 3, 1913, Chapter 16, 38 Statutes 114, 166, which taxed all income received after March 1, 1913, was specifically upheld in *Brushaber v. Union Pacific R. Co.*, (1916) 240 U. S. 1, 20, and in *Lynch v. Hornby*, (1918) 247 U. S. 339, 343. Some of the acts have taxed income earned in an earlier year. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863; this additional tax being imposed after the taxes for the year had been paid. In *Stockdale v. The Atlantic Ins. Co.*, (1874) 20 Wall. 323, 331, Mr. Justice Miller said:

> "No one doubted the validity of the tax or attempted to resist it."

The Act of February 24, 1919, Chapter 18, Title 2, 40 Stats. 1507, 1058-1088 (Com. St. 6336 1/8 a et seq.) which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States v. Robbins*, (1926) 269 U. S. 315, and numerous other cases

The Corporation Tax Act of August 5, 1909, Chapter 6, 38, 36 Stats. 11, 112 (Comp. St. 7280), applying to all net incomes for the calendar year was sustained in *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107. The Acts of March 3, 1917, Chapter 159, 39 Stat. 1000, and of October 3, 1917, Chapter 63, 40 Stat. 300, 302 (Comp. St. 6336 3/8 a et seq.), imposing excess profits taxes on the profits earned during the calender year, were so applied in *La-Belle Iron Works v. U. S.*, (1921) 256 U. S. 377, *Greenport Basin & Construction Co. v. U. S.*, (1923) 260 U. S. 512 and in other cases. The validity of the Act of February 24, 1919, Chapter 18, Title 3, 40 Stat. 1057, 1088 (Comp. St. 6336 7/16 a et seq.), taxing excess profits earned during the calendar year 1918, has never been questioned. See also *Willcuts c. Milton Dairy Co.*, (1927) 275 U. S. 215; *Blair v. Oesterlein Mach. Co.*, (1927) 275 U. S. 220; *Porto Rico Coal Co. Inc., v. Edwards* (D. C. N. Y.), (1921) 275 Fed. 104; *National Paper & Type Co. v. Edwards* (D. C. N. Y.), (1923) 292 Fed. 633. The Munition Manufacturer's Tax, imposed by the Act of September 8, 1916, Chapter 463, Title 3, 39 Stat. 756, 780 (Comp. St. 6336 1/4 a et seq.), applied to the 12 months ending December 31, 1916. See also *Carbon Steel Co. v. Lewellyn*, (1920) 251 U. S. 501; *United States v. Anderson*, (1926) 269 U. S. 422, 435. The Act of February 24, 1919, Chapter 18, 40 Stat. 1057, 1126 (Comp. St. 5980 n et seq.), which materially increased the capital stock tax, made the increase retroactive to July 1, 1918. In *Hecht v. Malley*, (1924) 265 U. S. 144, 164, these retroactive provisions were held to validate taxes erroneously assessed under an earlier act and paid before the passage of the Act of 1919.

Except for the peculiar tax involved in *Nichols v. Coolidge*, (1927) 274 U. S. 531, no federal revenue measure

has been held invalid on the score of retroactivity. The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive.

The above principles have been specifically applied to a retroactive special income tax upon only one class of income.

U. S. v. Hudson, (1937) 299 U. S. 498.

In Wisconsin there is no express constitutional prohibition against retroactive tax measures and it is the settled law of that State that income tax laws may operate retrospectively.

Income Tax Cases, (1912) 148 Wis. 456, 514 (writ of error dismissed 231 U. S. 616);
State ex rel. Globe Tubes Co. v. Lyons, (1924) 183 Wis. 107, 124;
Cliffs Chemical Co. v. Wisconsin Tax Comm. (1927) 193 Wis. 295, 302, (writ of error dismissed 277 U. S. 574);
West v. Tax Comm., (1932) 207 Wis. 557, 562;
Van Dyke v. Tax Comm., (1935) 217 Wis. 528.

In *State ex rel. Globe Steel Tubes Co. v. Lyons*, (1924) 183 Wis. 107, it was said at page 124:

"The question of the invalidity of a retroactive provision of the income tax act was urged in *Income Tax Cases*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, but the court denied the contention in a brief statement at page 514. This decision is cited in 25 Ruling Case Law, 795, and in Black, Income Taxes (4th ed.) sec. 22. The United States supreme court has held to the same effect. *Stockdale v. Insurance Cos.* 30 Wall. 323. The provision does not violate the federal constitution. *Bankers Trust Co. v. Blodgett*, 260 U. S. 647, 43 Sup. Ct. 233; note in 11 A. L. R.

518. Some of the states have constitutional prohibitions against retroactive laws. Decisions of the courts based on such provisions are not applicable here."

In *West v. Tax Comm.*, (1932) 207 Wis. 557, it was pointed out at page 562:

"* * * That it was intended to be retroactive in the sense above stated there can be no doubt, in the face of the absolute provision of sec. 27 of that chapter above quoted. That the fact that it was made retroactive does not render it unconstitutional is equally well settled. The first income tax act passed, operated upon income retroactively. It imposed a tax upon income already earned for that portion of the year 1911 intervening between January 1st and the passage of the act. The contention that this rendered the act unconstitutional was summarily dismissed by the court as too trivial to warrant discussion. *Income Tax Cases*, 148 Wis. 456, at p. 514 (134 N. W. 673, 135 N. W. 164). This question received more extended consideration in *State ex rel. Globe Steel Tubes Co., v. Lyons*, 183 Wis. 107, 197 N. W. 578, with like result. The supreme court of the Unted States holds that a tax imposed upon income alreay earned does not offend against the constitution of the United States. *Cooper v. U. S.*, 280 U. S. 409, 50 Sup. Ct. 164. The legislation of this state has frequently imposed income taxes upon income already earned. Such was the surtax provided for the payment of the soldiers' bonus by ch. 667, Laws of 1919, and such also is the surtax provided for emergency relief by ch. 29, Laws of the special session of 1931. By our present discussion we have perhaps accorded to appellant's contention a dignity to which the court did not consider it entitled in the *Income Tax Cases*, but we have done so in the hope of placing the question at rest."

To the same effect is *Van Dyke v. Tax Comm.*, (1935) 217 Wis. 528, 548-549.

In view of the foregoing there can be no doubt but that the Legislature had power to make the 1935 emergency relief income tax law applicable to said 1933 dividends.

There being no prohibition in the constitution against retrospective income tax legislation as such, it follows that such laws are valid and must be sustained until it is clearly demonstrated that their operative effect in fact contravenes some express provision of the constitution. Until a law reaches that point, wherever that may be, it must be held valid.

It has been recognized that the retroactivity of an income tax law which imposes a tax upon income of the year prior to its enactment is within the period of permissible retroactivity.

Stockdale v. The Atlantic Ins. Co., (1874) 20 Wall. 323, 331;
U. S. v. Robbins, (1926) 269 U. S. 315;
Willcuts v. Milton Dairy Co., (1927) 275 U. S. 215;
Blair v. Oesterlein Mach. Co., (1927) 275 U. S. 220;
Louisville Provision Co. v. Glenn, (D. C. Ky. 1937) 18 Fed. Sup. 423;
West v. Tax Comm., (1932) 207 Wis. 557.

In *Stockdale v. The Atlantic Ins. Co.*, (1874) 20 Wall. 323, this court in sustaining an income tax law which was assailed because retroactive in operation, said at page 331:

> "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted, much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of

the previous year, although one tax on it has already been paid, and no one doubted the validity of the tax or attempted to resist it."

It is thus clearly recognized by the above cases that the period of retroactivity during which an income tax may be operative extends to and includes a year that has closed at the time of enactment of the law. A tax law enacted during 1934 upon 1933 income would thus fall within the period of retroactivity which has been recognized. In order that the tax here in question be sustainable it is not necessary that the limits of permissible retroactivity be ascertained, but it is sufficient that such tax be operative within the period of permissible retroactivity. As was said by the Supreme Court of Wisconsin at page 327 in its decision herein, reported in 223 Wisconsin 319:

> "• • • While the present tax may approach or reach the limit of permissible retroactivity, it does not ~~reach~~ exceed it."

Bill No. 48A, which became Chapter 15, Laws of Wisconsin of 1935 was introduced in the Assembly of the Wisconsin Legislature on January 25, 1935. The Legislature had convened in regular session on January 9, 1935. Section 6 of said Capter 15 as enacted was substantially the same in the bill as introduced. The ony amendments thereto were in phraseology and in respects not here material. Upon the date of introduction it was referred to committee and upon passage by the Assembly on February 15, 1935 was sent to the Senate. The Senate adpoted an amendment thereto and concurred therein as amended on February 28, 1935. Upon concurrence by the Assembly on March 6, 1935, the bill was sent to the Governor of Wisconsin for approval. He approved it on March

14, 1935 and the law became effective by its terms upon publication on March 27, 1935.

The time of retroactivity of this tax is an extension for only a very short time beyond that which has been recognized as being within the period of permissible retroactivity. The mere time element of retroactivity is not in and of itself a controlling factor. The courts have not defined the limit to which an income tax may be retroactive. No case has made any attempt to do so. None of the cases say that beyond a certain point a tax may not be retroactive in operation. The farthest that any decision has gone is to hold that the retroactivity of the tax there in question was within the time permitted. The cases do not hold, and there is no indication in any of them, that a tax which is retroactive beyond the periods there recognized would be invalid. Thus beyond the periods of retroactivity which have been recognized there must exist time during which an income tax may operate retroactively and be valid. As there is no constitutional objection to retroactivity as such by reason of the mere lapse of time, a retroactive tax must be valid until its operation produces some result which violates an express provision of the constitution.

A retroactive income tax is valid up to the point where it is shown as a matter of fact that it has no relation to ability to pay. However, until it is shown as a fact that the tax goes back beyond the periods of recognized retroactivity to a point where it no longer has any relationship to ability to pay, there can be no question as to the validity of the tax and it must be sustained. Where no such showing is made there is no basis for questioning the validity of the tax on that ground.

It is a basic and fundamental principle that a presumption exists in favor of the constitutionality of a

statute. Thus, the presumption of constitutionality of a statute dealing with a subject clearly within the scope of legislative power prevails in the absence of some factual foundation of record for declaring it unconstitutional.

O'Gorman & Young v. Hartford F. Ins. Co., (1931), 282 U. S. 251.

When a taxpayer asserts that an income tax is so retroactive as not to relate to ability to pay the burden is upon him to make a showing to that effect. This the appellant has failed to do. There is nothing in the record that shows any facts during the intervening period that makes this tax operative in any manner in relation to ability to pay differently than if the tax had been enacted during the periods of retroactivity which have been recognized. Until the retroactive operation of an income tax reaches a point where the court can say as a matter of law that it inpinges some provision of the constitution, the tax must be sustained unless the above factual burden has been fulfilled. Certainly the short time that this tax is retroactive beyond the periods that have been recognized can not reasonably be the basis for the court to say that as a matter of law the tax is retroactive for too long a time. Thus neither as a matter of fact nor as a matter of law is the tax involved herein shown to be invalid because retroactive.

It is to be further noted that Chapter 15 of the Laws of Wisconsin of 1935, of which the tax here involved is a part, levied other special income taxes for emergency relief purposes. Section 2 of the Act imposed a special emergency relief tax upon income of the year 1934. The tax imposed by section 2 was in addition to the normal income tax on 1934 incomes. Not only was the tax levied by said section 2 imposed on the income of 1934 which

was subject to normal income taxes for that year under the general income tax law, Chapter 71, Wisconsin Statutes, but it was also imposed upon the dividend income of 1934 received from all corporations subject to Wisconsin income tax in 1934; paragraph (a), subsection (2), section 2, Chapter 15, Laws of Wisconsin of 1935. That is, for the purposes of the emergency tax on 1934 income, the deduction of the dividends allowed under section 71.04, subsection (4) Statutes of Wisconsin for normal income tax purposes, was not permitted. Such dividend income was thus included in the 1934 income taxed by said subsection (2) and such dividends were thereby subjected to the relief tax levied by section 2 of said Chapter 15. In addition, it is significant that section 2 not only expressly limited the deduction of losses from the sale of assets to a graduated basis dependent upon the length of time the assets had been held, but also expressly limited the deduction of such losses to only that extent to which gains from the sale of such assets were included in reported income. Thus, not only were dividends of 1934, of the type taxed by section 6, included in 1934 taxable income for relief purposes but the deduction for losses was restricted very narrowly. Under the tax scheme set out in said section 2 the losses of the type which the taxpayer suffered in 1933, had they occurred in 1934 would not have been deductible in determining taxable income for 1934 relief tax purposes.

At the time of the passage of said Chapter 15 the Legislature of Wisconsin had before it the problem of providing means to raise revenue in such amount as would meet the estimated needs for emergency relief purposes in 1934. Unquestionably the Legislature looked over the whole tax field in an endeavor to work out a scheme of taxation that would spread the additional tax burden

as broadly as possible so as to fall upon those best able to pay and be distributed as equitably as the conditions would permit. Income tax returns in Wisconsin are filed annually on or before March 15th, section 71.09 (4), (a), Wisconsin Statutes. The last returns to which the Legislature could resort in gathering information as to incomes were those filed March 15, 1934 in respect to 1933 incomes. From such returns the Legislature unquestionably ascertained the total amount of dividends received in 1933 which had been deducted in that year for normal income tax purposes and that said dividends had not been subjected to any state income tax as there was no emergency relief tax on the 1933 incomes. In furtherance of the desire to spread the emergency relief burden as broadly and equitably as it could, the legislature unquestionably felt that the dividends deducted in 1933 should bear a part of this additional revenue demand and that the recipients thereof were better able to pay the same than other persons whose income had been subjected to tax. Accordingly, it imposed the special income tax provided for in section 6.

While it is true that nominally the rates in section 6 are higher than those in the normal income tax law applicable to 1933 income and higher than the rates in the additional relief tax on 1934 incomes set out in section 2 of the same Act, it must be considered that the inclusion of such 1933 dividends in taxable income with the restriction on deduction of losses as provided in section 2 would bring them normally in the higher brackets. Had the taxpayer's 1933 dividends been included in 1933 taxable income under the same complete scheme as that of section 2, a tax would have been payable practically equivalent to the tax falling due under section 6. As was said by

the Wisconsin Supreme Court in its opinion in this case, 223 Wisconsin 319, at pages 324 and 325:

> "* * * Some point is made of the fact that the emergency tax upon this particular type of income is at a rate higher than the normal tax. We are not satisfied that such is the case. While the rates are nominally higher, it may well have been considered that this income, if added to the balance of the taxpayer's income, would normally be taxed in the higher rather than the lower brackets of the normal tax, and this factor could be taken account of in establishing rates for the special tax. Recognition of this principle appears to have been given in the case of *Colgate v. Harvey*, 296 U. S. 404, 56 Sup. Ct. 252. Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against when the whole pattern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted."

The Legislature was able, by referring to the 1933 income tax returns which had been filed, to accurately determine the amount that would be raised by levying the tax imposed by section 6. An estimate had been made of the amount of revenue needed by the State of Wisconsin for relief purposes in 1935. Had the tax of section 6 not been levied, it would have been necessary to have imposed the other taxes of Chapter 15 on estimated 1934 incomes at higher rates. This the Legislature would have been forced to do in order to raise revenue of sufficient amount

to meet the estimated needs. The whole scheme of Chapter 15 demonstrates that it was the intent and purpose of the Legislature in passing it to distribute the burdens of the relief tax load in relation to ability to pay. The tax levied by section 6 is imposed upon income of the most recent year for which income tax reports were on file. Not only are there no facts shown which make a tax on the income of 1933 relate any less to ability to pay than a tax on income of the year next preceding the enactment of an income tax law, but the situation which did exist was such that the Legislature, in the exercise of its discretion, could justifiably say that the tax of section 6 bore a very definite relation to ability to pay. This is especially true when it is realized that the session of the Legislature in 1935 which convened on January 9, 1935 was the first Legislature of the State of Wisconsin which had met following the filing on March 15, 1934 of income tax returns of 1933 income. The last previous session of the Legislature thereto was the special session which had adjourned February 3, 1934.

The power to tax is essential to the operation of government. It is as broad as the demands which are properly made upon the government. The methods of exercising such power must be considered in light of the exigencies of the occasion. The Legislature must be given a wide discretion in exercising such tax power, especially in times of emergency when unusual and additional demands are made upon the revenues of the government. The imposition of the tax here involved is a mode of exercising that power which, in view of the circumstances that were existent at the time the legislation was enacted, is certainly within the field of reasonable discretion of the Legislature of Wisconsin. Certainly the field of legislative discretion in exercising of the tax power is not to

be restrained or restricted by the mere lapse of a few months beyond the time which has been heretofore recognized as proper, and more especially when no showing has been made of anything occurring therein that in any manner affects the reasonableness of the exercise of such power.

CONCLUSION

Upon the foregoing reasoning it is submitted that section 6 of Chapter 15 of the Laws of Wisconsin for 1935 is valid legislation and imposes an income tax that is not contrary to the provisions of section 1 of the 14th Amendment to the Constitution of the United States. The decision of the Supreme Court of the State of Wisconsin sustaining the same should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1938.

No. 13.

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

PETITION FOR REHEARING.

JOHN M. CAMPBELL,
Attorney for Appellant.

IN THE

Supreme Court of the United States

October Term, 1938.

No. 13.

EARLE S. WELCH,

Appellant,

vs.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin,

Appellees.

PETITION FOR REHEARING.

COMES NOW the above named appellant, Earle S. Welch, and presents this his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

1. In his brief and argument the appellant contended under Item C thereof that the true nature of the tax imposed by Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 made it a property tax or an excise and that as such it was arbitrary and discriminatory and hence in violation

of Section 1 of the Fourteenth Amendment to the Constitution of the United States because of the graduated rates at which the tax was imposed. This contention of the appellant was not discussed in the opinion of the court and it does not appear from the opinion that the question so raised was decided by the court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Wisconsin be, upon further consideration, reversed.

Respectfully submitted,

John M. Campbell

Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, John M. Campbell, counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John M. Campbell

Counsel for Earle S. Welch, Appellant.

pp. 4-8

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1938.

Earle S. Welch, Appellant,
vs.
Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin.

Appeal from the Supreme Court of the State of Wisconsin.

[November 21, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal presents the question whether the Act of the Wisconsin Legislature of March 27, 1935, which imposed a tax on corporate dividends received by appellant in 1933 at rates different from those applicable in that year to other types of income and without deductions which were allowed in computing the tax on other income, infringes the equal protection and due process clauses of the Fourteenth Amendment.

The statute of Wisconsin in force in 1933 and since imposes a tax on net income at graduated rates. Wisconsin Stat. 1933, c. 71. Appellant, a resident of Wisconsin, received in 1933 gross income of $13,383.26, of which $12,156.10 was dividends received from corporations whose "principal business" was "attributable to Wisconsin" within the meaning of the taxing statute. By § 71.04(4), Wisconsin Stat. 1933,[1] such dividends were deductible from gross income in computing net taxable income, together with other items, including taxes, interest paid, business expenses, losses from the sale of securities, and donations, aggregating, in the case of appellant, $11,161.97, so that he had no taxable net income for the year 1933.

Petitioner's income tax return was due and filed March 15, 1934. A year later c. 15 of the Laws of Wisconsin for 1935, effective March 27, 1935, laid new taxes for the years 1933 and 1934 upon

[1] Sec. 71.04(4) permits the deduction from gross income of dividends received from corporations whose principal business is attributable to Wisconsin; "... any corporation shall be considered as having its principal business attributable to Wisconsin if 50 per cent. or more of the entire net income or loss of such corporation ... (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71. ..."

various taxable subjects. Section 6, with which we are alone concerned, imposed a graduated tax, with no deduction except the sum of $750, on all dividends received in 1933 which, when received, were deductible from gross income under § 71.04(4). The statute declared that the levy was an emergency tax to provide revenue for relief purposes and directed that the proceeds should be paid into the state treasury to be used for "unemployment relief purposes." Appellant paid the tax, amounting to $545.71, under protest, on May 13, 1935, and brought the present suit to compel its restitution as exacted in violation of the state constitution and the equal protection and due process clauses of the Fourteenth Amendment. From the judgment of the Supreme Court of Wisconsin sustaining the tax, 226 Wis. 595, the case comes here on appeal. § 237 of the Judicial Code, 28 U. S. C. § 344.

First. Appellant assails the statute as a denial of equal protection because the dividends which it selected for taxation as a special class were subjected ratably to a tax burden different from that borne by other types of income for the same year by reason of the fact that the dividends were taxed at a different rate from that applied to other income and were given the benefit of but a single deduction of $750, while recipients of other types of income in that year were permitted to deduct specified items of interest, taxes, business losses and donations. It is not contended that the receipt of dividends from corporations is not subject to tax, or that apart from the retroactive application of the tax they could not be included in gross income for the purpose of arriving at net taxable income, but it is insisted that disparities in the tax burdens which may result from the different rates and deductions infringe the constitutional immunity.

Wisconsin income tax legislation has from the beginning treated dividends received from corporations deriving a substantial part of their income from business carried on within the State, on which the corporations have paid a tax to the State, as a distinct class of income for tax purposes. At first complete tax immunity was granted to them. § 1, c. 658, Laws of Wisconsin, 1911. Later the immunity was allowed ratably in the same proportion that the income of the corporation had been subjected to state income tax. § 1, c. 318, Laws of Wisconsin, 1923. And, finally, by amendment adopted in 1927[2] and in force in 1933 complete immunity of dividends from income tax was allowed if 50% or more of the

[2] C. 539, § 4, Laws of Wisconsin of 1927.

al net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income.[3]

When in 1935 the State was confronted with the necessity of raising revenue to meet the demand for unemployment relief, and of distributing the cost among its taxpayers, the legislature found one class of untaxed income, dividends received from a specified category of corporations. It also could have concluded that a substantial part of this income had borne no tax burden at its source in the earnings of the corporations, since, by § 71.02(3)(d), corporations are not required to pay a tax on that part of their income allocable to business carried on or property located without the state.

We think that the selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the Fourteenth Amendment. It cannot be doubted that the receipt of dividends from a corporation is an event which may constitutionally be taxed either with or without deductions, *Lynch* v. *Hornby*, 247 U. S. 339; see *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, 381, even though the corporate income which is their source has also been taxed. See *Tennessee* v. *Whitworth*, 117 U. S. 129, 136; *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 23; *Colgate* v. *Harvey*, 296 U. S. 404, 420. The fact that the dividends of corporations which have to some extent borne the burden of state taxation constitute a distinct class for purposes of tax exemption, *Colgate* v. *Harvey*, *supra*; compare *Travellers Insurance Company* v. *Connecticut*, 185 U. S. 364, 367; *Kidd* v. *Alabama*, 188 U. S. 730; *Dornell* v. *Indiana*, 226 U. S. 390, 398, and that in consequence such dividends have borne no tax burden, is equally a basis for their selection for taxation. *Watson* v. *State Comptroller*, 254 U. S. 122, 124, 125; *Klein* v. *Board of Tax Supervisors*, *supra*. Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection. See *Watson* v. *Comptroller*, *supra*, 125. Nor is the tax any more a denial of equal protection because retroactive. If the 1933 dividends differed sufficiently from other classes of income to admit of

[3] See Note 1, *supra*.

the taxation, in that year, of one without the other, lapse of time did not remove that difference so as to compel equality of treatment when the income was taxed at a later date. Selection then of the dividends for the new taxation can hardly be thought to be hostile or invidious when the basis of selection is the fact that the taxed income is of the class which has borne no tax burden. The equal protection clause does not preclude the legislature from changing its mind in making an otherwise permissible choice of subjects of taxation. The very fact that the dividends were relieved of tax, when the need for revenue was less, is basis for the legislative judgment that they should bear some of the added burden when the need is greater.

Numerous retroactive revisions of the federal revenue laws, presently to be discussed, have imposed taxes on subjects previously untaxed and shifted the burden of old taxes by changes in rates, exemptions and deductions. It has never been thought that the equal protection clause precludes such changes if the new taxes could have been included in the earlier act when adopted. If some retroactive alteration in the scheme of a tax act is permissible, as is conceded, it seems plain that validity, so far as equal protection is concerned, must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes. If such changes are forbidden in the name of equal protection, legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience had shown to be inequitable, even though constitutional.

The bare fact that the present tax is imposed at different rates and with different deductions from those applied to other types of income does not establish unconstitutionality. It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 284, 285, and cases cited.

Just what the differences are in the tax burdens cast upon the two types of income by the divergence in rates and deductions applied to them does not appear. The burden placed on dividends by the taxing act might have been greater if they had been included in

gross income and taxed on the same basis as other income since, in that case, the resulting increase in net income would be taxed at the rates applicable to the higher brackets. When the challenged statute was enacted there were available to the legislature the returns for the taxable year showing the different classes of income, the application to them of the existing law, and the effect of existing rates and deductions. There were also data to be derived from the corporation tax returns showing what part of the exempted dividends had their source in corporate income which had been taxed to the corporation and what part was attributable to corporate income not similarly taxed. The legislature was free to take into account all these factors in prescribing rates and deductions to be applied to the newly taxed dividends so as to arrive at an equitable distribution of the added tax burden. In the absence of any facts tending to show that the taxing act, in its purpose or effect, is a hostile or oppressive discrimination against the recipients of dividends who have been hitherto fortunate enough to escape all taxation we cannot say the taxing statute denies equal protection.

Second. The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U. S. 15, 21; and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Untermeyer* v. *Anderson*, 276 U. S. 440, 445 (citing *Blodgett* v. *Holden*, 275 U. S. 142, 147); *Coolidge* v. *Long*, 282 U. S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice

was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, *Milliken* v. *United States*, *supra*. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. See *Wagner* v. *Baltimore*, 239 U. S. 207; *Seattle* v. *Kelleher*, 195 U. S. 351; compare *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 454; *Billings* v. *United States*, 232 U. S. 261, 282. Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here. For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. See *Untermeyer* v. *Anderson*, *supra*, Footnote 1. These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws. This was notably the case with the "Revenue Act of 1918," enacted February 24, 1919, 40 Stat. 1057, and made applicable to the calendar year 1918, which cut down exemptions and deductions, increased, in varying degrees,

income, excess profits and capital stock taxes, altered the basis of surtaxes, and increased in progressive ratio the rates applicable to the higher brackets. Similarly the special munition manufacturer's tax, imposed on profits derived from sales of munitions, Act of September 8, 1916, c. 463, 39 Stat. 756, 780, was applied to the twelve months ending December 31, 1916. Cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *United States* v. *Anderson*, 269 U. S. 422, 435. The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Fifth Amendment has been uniformly rejected. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331; *Railroad Co.* v. *Rose*, 95 U. S. 78, 80; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Billings* v. *United States*, 232 U. S. 261, 282; *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *LaBelle Iron Works* v. *United States*, 256 U. S. 377. The like practice of the legislature of Wisconsin has been approved by its courts.[4]

The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated. We cannot say that the due process which the Constitution exacts denies that opportunity to legislatures; that it withholds from them, more than in the case of a prospective tax, authority to distribute the increased tax burden in the light of experience and in conformity with accepted notions of the requirements of equal protection; or that in view of well established legislative practice, both state and national, taxpayers can justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the in-

[4] Income Tax Cases (1912), 148 Wis. 456, 514; State ex rel. Globe Tubes Co. v. Lyons (1924), 183 Wis. 197, 124; Cliffs Chemical Co. v. Wisconsin Tax Comm. (1927), 193 Wis. 295, 302; West v. Tax Comm. (1932), 207 Wis. 557, 562; VanDyke v. Tax Comm. (1935), 217 Wis. 528.

come is available. And we think that the "recent transactions" to which this Court has declared a tax law may be retroactively applied, *Cooper v. United States*, 280 U. S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.

The Joint Resolution of Congress of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this tax being imposed after the taxes for the year had been paid. In *Stockdale v. Insurance Companies*, *supra*, 311, Mr. Justice Miller said of it: "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted. . . . no one doubted the validity of the tax or attempted to resist it." The Act of February 24, 1919, c. 18, Tit. 2, 40 Stat. 1057, 1068-1068, which taxed incomes for the calendar year 1918, was applied without question as to its constitutionality in *United States v. Robbins*, 269 U. S. 315, and in other cases.

In the present case the returns of income received in 1933 were filed and became available in March, 1934. Wisconsin Stat. 1933, § 71.09(4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By § 4, Art. V, of the Wisconsin constitution, and § 13.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special sessions of the legislature may be held on call of the governor, at which no business can be transacted "except as shall be necessary to accomplish the special purposes for which it was convened." § 11, Art. IV, Wisconsin constitution. A special session was called by the governor in 1934, but for purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 7, 28, 1933, January 18, 23, 30, 1934. Thus the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in *Stockdale v. Insurance Companies*, *supra*.

While the Supreme Court of Wisconsin thought that the present tax might "approach or reach the limit of permissible retroactivity", we cannot say that it exceeds it.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1938.

Earle S. Welch, Appellant, vs. Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin.	Appeal from the Supreme Court of the State of Wisconsin.

[November 21, 1938.]

Mr. Justice Roberts.

The Constitution of Wisconsin, Article VIII, Sec. 1, provides: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided." Pursuant to this grant, the State, since 1911,[1] has had a statute levying a general income tax on corporations and individuals at a graduated rate. The system, which is analogous to that with which we are familiar in the federal field, has, like the latter, been amended from time to time in detail. The law as it stood in 1933 is found in the 1933 edition of the Wisconsin statutes as chapter 71. The tax is imposed for annual periods. The gross income of a given year includes rents, dividends, wages, and salaries, profits from the transaction of business or sale of property and all other gains, profits, or income derived from any source except such as are specifically exempted. In ascertaining taxable income each taxpayer is entitled to deduct from gross receipts wages, salaries, and other expenses of conducting a business, occupation, or profession, depreciation, also cost of property sold. In addition each is permitted to deduct certain losses incurred within the year not compensated by insurance, interest paid on indebtedness, state and federal taxes, contributions to the State or its subdivisions or to charitable objects and amounts paid to an unemployment reserve.[2] Pensions are exempted, and a specified amount may be deducted from the tax, when ascertained, as a personal exemption.[3] Dividends [with exceptions not material] received from certain corporations filing income tax returns

[1] Laws of Wisconsin 1911, Chap. 658, p. 984.
[2] Sec. 71.04.
[3] Sec. 71.05.

under the law, and paying income tax to the State, are deductible from gross income.[4] We were told at the bar that this deduction had been authorized for many years prior to 1933.

The appellant, a resident of Wisconsin, on or about March 15, 1934, as by law required, made a return of his income for 1933 showing his gross income and took deductions for interest paid, for losses on the sale of securities, for business expenses, for charitable contributions, and for dividends received from certain corporations, with the result that no net taxable income remained. Without the deduction of the dividends his net income would have been $2,221.39.

When the Wisconsin legislature met in its regular biennial session in January 1935 it was confronted by a need for additional revenue to meet the State's obligations. The condition is referred to as an emergency because the need for additional funds grew out of the then current relief load, but the emergency was no different than if the State had found itself short of funds for the payment of official salaries. As the Supreme Court of Wisconsin has said: "Expense for relief of the unemployed is on no different footing than any other governmental expense."[5] And it goes without saying that an emergency does not create power but is merely the occasion for the exercise of existing powers in conformity to constitutional principles.[6]

What then did the legislature do to meet the demand for public revenue? It adopted a statute effective March 27, 1935.[7] By section 2 this act laid an income tax additional to and separate from the general income tax at a graduated rate on the income of all individuals, for the year 1934, which was to be "assessed, collected and paid in the same manner, upon the same income and subject to the same regulations," as provided "by law for the assessment, collection and payment of the normal income tax" with certain variations. One of the variations was that no deduction was to be allowed for those corporate dividends which were deductible under subsection (4) of section 71.04 of the general law.

Section 3 imposed an additional tax on transfers of property made up to July 1, 1937. Section 4 placed additional license fees

[4] Sec. 71.04(4).

[5] Scobie v. Tax Commission, 225 Wis. 529, 538.

[6] Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 425, 426; Wilson v. New, 243 U. S. 332, 348.

[7] Laws of Wisconsin 1935, Chap. 15, p. 19.

for the year 1934 on telephone companies. Section 5 imposed an additional license fee for 1934 upon electric, gas and similar utility companies.

Section 6 imposed on the 1933 dividends, which had been deductible under the general law, a graduated tax of one per cent. on the first two thousand dollars of net dividend income, three per cent. on the next $3,000, and seven per cent. on all above $5,000. Net dividend income is defined as gross dividend income less $750. The tax is to be assessed, collected and paid in the same manner as the normal income tax for 1934. Under this section the appellant was required to make return and pay on some $12,000 of the dividends which he had been permitted to deduct from gross income in calculating and paying his income tax for 1933 and was assessed thereon $545.71 which he paid under protest and brought this action to recover.

The question is whether Section 6 transgresses the prohibition of the Fourteenth Amendment. The Supreme Court of Wisconsin, although stating that "While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it", sustained the statute as against challenge under the equal protection and due process clauses of the amendment.[3] I think the statute is violative of the guarantees of equal protection and due process.

One must ignore the realities of the situation if he approaches a decision of the case in the light of the equal protection clause as if the statute under attack were prospective in operation; or, in the light of the due process clause, as if the statute were a revision of an existing general income tax system theretofore in force. The illegal discrimination and the arbitrary character of the Act condemn it under the equal protection clause not because it selects a particular class of citizens for the imposition of the tax but because, in so doing, it reaches back and singles out for a new and wholly different sort of income tax those few only to whom a specific deduction was allowed in the general computation of their taxable income for the year 1933. It will not do to examine the classification as if it were the declaration of a new policy of taxation to be operative in the future. No more will it do to separate the retro-

[3] The judges who heard the cause were equally divided in opinion. Four justices of the Supreme Court voted to sustain the Act. The trial judge and three justices of the Supreme Court were of the opinion that it was unconstitutional.

active feature of the law and consider it as if it were a mere amendment of a general income tax system as much applicable to all income of all taxpayers subject to the law as it stood at the date of the amendment. The reason for allowing the deduction is plain. As has been said in this court: "The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin of the income received by individuals in the form of dividends."[9] The same thing may be said as to the reason for other allowable deductions, as, for instance, of taxes paid. Reasons of fairness and public policy moved the State to allow the permitted deductions from gross income.

It readily may be conceded that Wisconsin is, and always has been, free in the imposition of an income tax, for good and sufficient reason, to treat the recipients of dividends on a basis different from the recipients of other sorts of income. The State also was free to revoke, alter, and amend the provisions for deductions as its views of fairness and policy might dictate. This case presents no such situation. After the taxpayers had returned and paid their tax under the existing system and according to the long established public policy of the State, the State sought additional revenues. Instead of levying an exaction upon the citizens generally or certain classes of citizens, the State went back and sought to tax a small class of income tax payers by reason of the purely arbitrary and adventitious fact that they had been allowed a particular deduction in a past year. It chose as the base of the tax a part of the income of the taxpayer under the law as previously in force. The previously granted deduction was not withdrawn but, on the contrary, the income represented by that deduction was picked out from all others, was classified by itself and taxed in a manner wholly unrelated to the income and the taxes of the recipient of those dividends under the general law under which he had computed and paid his tax. If the State was at liberty to do this it was equally free to tax at a new rate and upon a new scheme income of the taxpayers who in 1933 deducted losses sustained or those who deducted interest paid or taxes paid or charitable contributions made. It was equally at liberty to form a taxable class of those who were granted personal exemptions, to wrest out of their setting, as part of the general income of a taxpayer, rents received, royalties received, or professional income accrued in 1933

[9] Miller v. Milwaukee, 272 U. S. 713, 717.

ed to impose a special income tax on one or all of those items. As the trial judge well said:

"In the equitable distribution of taxation persons receiving dividends in the year 1933 should not be classified less favorably than persons receiving other kinds of income that year. For the purpose of taxation the income was not materially different than the following kinds: Salaries paid officers of private corporations; salaries paid to public officials; interest; rents; profit and income of all kinds received by individuals and corporations generally, unless some good reason appeared for some legislative exception.

"The statute is also discriminatory against the class of persons receiving dividends in the year 1933 when compared with other classes of persons when such other classes are assessed at all. It discriminates in being more drastic in limiting deductions for losses, expenses and exemptions. It is more drastic in the rapid increase of the graduated rate. For some reason one class only was selected to bear the entire burden of the emergency tax in question. This class was subjected to an unusually inequitable burden."

Decisions sustaining the power of a state prospectively to classify, to grant exemptions, or otherwise to interrelate the tax burdens of different classes of taxpayers are of no aid and lend no support to the present statute. In no case heretofore to which attention has been called have the courts sustained a law which after the fact reaches back two years and selects for a special form of income taxation at a new rate a group of the taxpayers who, in accordance with preexisting law, had paid that share of the general income tax which the legislature had adjudged to be its equal and proportionate share of the burden of government. To attempt this was, in my judgment, arbitrary and discriminatory classification.

From what has been said I think it apparent that the retroactivity of the challenged statute taken alone is not the element which condemns it any more than the attempted classification alone would condemn it if the act were prospective in operation. The cases relied upon to support the statute, viewed in its retroactive aspect, do not meet the present case. In one of the cited cases,—*United States* v. *Hudson*, 299 U. S. 498, 500,—earlier decisions were thus summarized: "As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized the practice and

sustained it. . . . ." That was a case which fell squarely within this statement of the scope of permissible retroactivity. All enactments sustained that amended the tax system of a prior year were continuations of that existing system, and the taxpayers had knowledge before the expiration of the year of receipt of the income by which the tax was measured that amendment of the system was under consideration. To this class belongs the provision of the Wisconsin Act of 1935 imposing an additional tax on income received in 1934. This feature of the Act is not here under attack. A very different course was adopted with respect to the income of 1933. For that year the statute imposed a special income tax on a class selected because the law in force when they paid their taxes had permitted them to deduct certain items, and ignored all others to whom similar deductions had been granted. Thus the whole scheme of the general income tax was unbalanced and a peculiar and specific burden laid upon a selected few who had theretofore been relieved of the unjust burden of double taxation. What was said in *Milliken* v. *United States*, 283 U. S. 15, 21, is peculiarly apposite to the facts here disclosed. There, referring to earlier decisions, condemning, under the due process clause, retroactive taxes, it was stated: "In both the point was stressed, as the basis of decision, that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." Here the nature and amount of this special and peculiar tax could not have been understood and foreseen when the petitioner paid his 1933 income tax.

It is to be remembered that the Act in question is not a curative statute for the collection of taxes assessed in a prior year and uncollected[10] nor one intended to make available taxes which, by reason of illegality in their imposition, were not paid in the year in which they were assessed.[11] The Act is not a remedial measure to confirm or ratify a doubtful administrative interpretation of prior legislation.[12] It does not lay an excise or a privilege measured by the income of a prior year,[13] nor is it a statute to settle doubts as to whether an earlier taxing act had expired by limitation.[14]

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[10] Florida Central &c. R'd v. Reynolds, 183 U. S. 471.
[11] Citizens National Bank v. Kentucky, 217 U. S. 443.
[12] Heckt v. Malley, 265 U. S. 144.
[13] Flint v. Stone Tracy Co., 220 U. S. 107.
[14] Stockdale v. Insurance Companies, 20 Wall. 323.

It was suggested at the bar that the exaction is a property tax and bad as such because retroactively imposed. The reply was that retroactive property taxes have been upheld. The cases cited do not touch the validity of an ad valorem property tax retroactively imposed. Some of them involved special assessments for benefits assessed after the completion of the improvement.[15] Another cited to the proposition dealt with an excise for the use, for pleasure, of foreign built yachts either owned or chartered by the user for more than six months during the taxable year. The exaction was held an excise on the privilege of use and not a tax upon ownership, and, moreover, the tax was not retroactive in operation but was assessed upon the taxpayer at a date during which the taxpayer's use of the yacht continued.[16] Still another dealt with a curative act passed to reach property illegally assessed.[17] But whether viewed as a property or an income tax the exaction is bad. Most, if not all, the states have long maintained the policy of exempting places of religious worship from annual tax levies. Will it be contended that if the state were now to impose a tax on the value of such exempt property for some past year, the action would not be an arbitrary taking of property as well as a hostile discrimination?

If, as this court has repeatedly said, an income tax is an equitable method of distributing the necessary burdens of government, certainly no such discrimination as is evidenced by the challenged act can properly fall within the description. The Act evidences purposeful and arbitrary discrimination and thus violates the guarantee of equal protection.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER join in this opinion.

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[15] Seattle *v.* Kelleher, 195 U. S. 351; Wagner *v.* Baltimore, 239 U. S. 207.
[16] Billings *v.* United States, 232 U. S. 261.
[17] Citizens National Bank *v.* Kentucky, *supra*.